IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1188

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
Petitioners,

—v.—

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX TO APPENDIX *

	Page
Relevant Docket Entries	1
In the United States District Court of the District of Columbia:	
Plaintiffs' Statement of Material Facts Not In Issue	3
Affidavit of Adam Hochschild	8
Order of the Supreme Court Granting the Petition for a Writ of Certiorari	10

* The complaint is reproduced as Appendix C to the petition for a writ of certiorari, pp. 37-48. The list of members of the 93rd Congress who are members of a reserve component is reproduced as Appendix D to the petition, pp. 49-51. The district court's opinion and order is reproduced as Appendix B to the petition, pp. 17-36. The judgment of the court of appeals is reproduced as Appendix A to the petition, pp. 15-16.

RELEVANT DOCKET ENTRIES

1970	
May 11	**Complaint filed**
July 29	**Defendants' motion to dismiss filed**
August 10	**Plaintiffs' opposition to motion to dismiss filed**
November 27	**Plaintiffs motion for summary judgment filed**
1971	
February 2	**Defendants' motion for summary judgment filed**
February 24	**Cross motions for summary judgment heard**
April 2	**Memorandum opinion and order granting declaratory judgment, and denying all other relief and dismissing complaint as to that relief filed**
May 28	**Defendants' notice of appeal filed**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1429-70

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL., PLAINTIFFS

v.

MELVIN LAIRD, ET AL., DEFENDANTS

STATEMENT OF MATERIAL FACTS NOT IN ISSUE

1. Plaintiff Reservists Committee to Stop the War (Committee) is a national unincorporated association of present and former officers and enlisted members of the Reserves, organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to persuade the Congress of the United States and all members of the Congress to take all steps necessary and appropriate to end that involvement. It was founded in December, 1969. It has approximately 1,300 members, of whom 51 are Reserve officers.

2. Plaintiff Adam Hochschild is co-chairman of the Reservists Committee to Stop the War.

3. Plaintiff Ernest Notar is an officer in the Reserves, specifically the Naval Reserve, and is in active Ready Reserve status.

4. Plaintiff Bruce Phillips is an enlisted member of the Reserves, specifically the Air Force Reserve, and is in active Ready Reserve status.

5. Plaintiff David L. Kranz is an officer in the Reserves, specifically the Naval Reserve, and at the time the complaint in this action was filed was in active Ready Reserve status; but on June 3, 1970, was transferred to inactive Standby Reserve status.

6. Plaintiff George Holmes is an enlisted member of the Reserves, specifically the Army Reserve, and is in active Ready Reserve status.

7. All the individual plaintiffs are United States citizens and taxpayers and are residents of California. All share the views and aims of and are members of the Committee.

8. Defendant Laird is the Secretary of Defense of the United States with administrative authority, under the President as Commander in Chief, over the Armed Forces of the United States, including the Reserves.

9. Defendants Resor, Chafee and Seamans are the Secretaries of the Army, Navy and Air Force, respectively, with administrative authority, under the President as Commander in Chief and under the Secretary of Defense, over the armed services within their respective jurisdictions, including the respective Reserves.

10. Defendants may, in their discretion as provided in 10 U.S.C. 672 and 674, order members of the Reserves, including members of Congress who are members of the Reserves, into active duty without their consent

(a) for the duration of any war or national emergency declared by Congress;

(b) at any time, for members of the Reserve in active status, for no more than 15 days a year.

11. Defendants may at any time, in their discretion as provided in 10 U.S.C. 681, release members of the Reserves, including members of Congress who are members of the Reserves, from active duty.

12. All commissioned officers in the Reserves below flag or general officer rank are appointed by the President alone; all commissioned officers in the Reserve of flag or general officer rank are appointed by the President with the advice and consent of the Senate; commissioned officers in the Reserves of all ranks serve during the pleasure of the President and may be discharged by him alone; all as provided in 10 U.S.C. 593.

13. Senators and members of the House of Representatives subscribe to the following oath of office:

> I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance

to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.

14. Members of the National Guard subscribe to an oath to "obey the orders of the President of the United States and the Governor of the State of [name of state]", as provided in 32 U.S.C. 312.

15. On December 12, 1965, defendant Laird's predecessor as Secretary of Defense issued a directive transferring all members of Congress then in Ready Reserve to the Standby Reserve; but permitting those with a remaining statutory military obligation, or with more than 18 but less than 20 years of service toward retirement, to continue to participate voluntarily in Reserve training.

16. On May 22, 1969, defendant Laird authorized all persons, including members of Congress, transferred to the Standby Reserve by the directive referred to in paragraph 15, to be assigned, at their request, to the Active status list of the Standby Reserve, to participate in training and to earn training points creditable for promotion and retirement.

17. The Defense Department lists, as of June 10, 1970 (Appendix A), a total of 130 members of Congress in the Reserves. All but one, Senator John Tower of Texas, a Naval Boatswain's Mate 3d Class, are commissioned officers.

Two are Ready Reservists, attending drills. Thirty-four are active standby Reservists, earning points for retirement and promotion and participating in "training". Seventeen are retired with pay. Fifty-three are retired without pay, but some may begin to receive pay at age 60. 10 U.S.C. 1331, 1332. Four hold the rank of Major General, one the rank of Brigadier General and one the rank of Rear Admiral.

18. Members of the Reserve constitute a dominant minority, in numbers much greater in proportion than their numbers in proportion to the whole membership of the

Senate and of the House of Representatives respectively, in the Armed Services Committees of the Senate and the House of Representatives; the Veterans Affairs Subcommittee of the Labor and Public Welfare Committee of the Senate, and the Ways and Means Committee of the House of Representatives. Ten out of eighteen (56%) of the members of the Senate Armed Services Committee are Reservists; three out of seven (43%) of the members of the Senate Finance Committee's Subcommittee on Veterans Legislation are Reservists; thirteen out of forty (33%) of the members of the House Armed Services Committee are Reservists; eight out of twenty-five (33%) of the members of the House Veterans Affairs Committee are Reservists; four out of eleven (36%) of the members of the House Appropriations Committee's Subcommittee on Defense Appropriations are Reservists; four out of six (67%) of the members of the House Veterans Affairs Committee's Subcommittee on Compensation and Pension are Reservists.

19. Reservists receiving pay, and their Congressional assignments, include:

House of Representatives

Carl Albert	Majority Leader
William G. Bray	Armed Services
Cornelius E. Gallagher	
Charles R. Jones	Appropriations
John O. Marsh, Jr.	Appropriations
G. V. (Sonny) Montgomery	Veterans Affairs
William F. Nichols	Armed Services
Alexander Pirnie	Armed Services
Howard W. Pollack	
Benjamin Reifel	Appropriations
Olin E. Teague	Veterans Affairs (Chairman)
Louis C. Wyman	Appropriations

Senate

J. Caleb Boggs	Appropriations
Hiram Fong	Appropriations
Barry M. Goldwater	Armed Services
Edward J. Gurney	
Hugh Scott	Minority Leader
John J. Sparkman	Joint Committee on Defense Production (Chairman)
J. Strom Thurmond	Armed Services

20. In 1950 by Presidential Proclamation No. 2914 a call-up of Reservists that eventually totalled 938,379 officers and men was authorized for the Korean Conflict. In 1961, by joint resolution, P.L. 87-117, the Congress authorized a call-up of 250,000 men for the Berlin Crisis. 155,000 were called and 147,849 served. For the Cuban Missile Crisis, Congress by P.L. 87-736 authorized a call-up of 150,000 men. 14,200 were called and 14,025 served. For the Pueblo Crisis and for Vietnam, as of December 15, 1969, 35,280 Reservists had been called to duty. No members of Congress were included in any of these reserve call-ups.

21. Prior to January 18, 1965, there existed special reserve units whose membership consisted exclusively of members of Congress and Congressional staff personnel. Those units were designated the "Army Congressional Command Operations Reserve Group", the "Navy and Marine Corps Reserve Composite Company 5-48" and the "9999th Air Reserve Squadron".

22. Those units were disestablished on January 18, 1965.

23. On May 14, 1970, Senator Strom Thurmond, a retired Major-General in the Army Reserve who receives retired pay, proposed the re-establishment of "an Army Reserve Unit on Capitol Hill for members of Congress who are Army Reservists". The Secretary of Defense stated that he would not object to formation of such units.

WILLIAM A. DOBROVIR
1025 Connecticut Avenue, N.W.
Washington, D. C. 20036

STATE OF CALIFORNIA)
)
COUNTY OF SANTA CRUZ)

AFFIDAVIT

I, Adam Hochschild, President of the Reservists Committee to Stop the War, make the following affidavit:

The Reservists Committee to Stop the War was founded in December 1969. We have recently filed application for incorporation as a non-profit corporation in the state of California. A copy of our by-laws is attached.

The Committee now has approximately 1,300 members. All but a few are Reservists or National Guardsmen currently in Ready Reserve or Standby Reserve status. Some were active or standby Reservists or National Guardsmen at the time they became members but are no longer on such status. Fifty-one of our members are Reserve officers. Forty-nine are veterans of Vietnam.

One of the Committee's prime purposes is the circulation and publicizing of a statement against the war, which all of our members have signed. The statement has been published in the New York Times, the New Republic, and other publications. A copy is attached. Another principal activity is the publication of a monthly newsletter for all members and other interested persons. Several recent issues are attached. Other activities vary from one part of the country to another: some are described in the issues of the newsletter.

Reservists Committee members come from more than 30 states. About 50% are residents of California, the state where the Committee started; the remainder are scattered in other parts of the country, with heavy concentrations in New York, New England, and the Washington, D. C. area. There are chapters or affiliated organizations in a number of different cities: San Francisco, Los Angeles, New York, Boston, Baltimore, Washington, Seattle, Chicago, Providence. In some cities, such as Providence, Chicago and Seattle, the groups officially call themselves local chapters of the Reservists Committee to Stop the War. In other cases the local group has

a different name but has become affiliated with us, and we list their address in our newsletter so members from their area can contact them.

Members come from all seven components of the U.S. Reserve Forces: the Army, Navy, Air Force, Marine, and Coast Guard Reserves, and the Air and Army National Guard. There are more Army Reservists and Marine Reservists than any others.

The Committee is currently engaged in two other legal actions, in both of which we are a co-plaintiff with coalitions of other peace organizations. One is a lawsuit in Federal District Court in Washington, attempting to procure for peace groups the same access to government mailing lists of military veterans now held by groups like the American Legion and the V.F.W. The other legal action is a complaint to the Federal Communications Commission, requesting equal time against military recruiting commercials on the same basis on which anti-smoking ads get equal time against cigarette commercials. The FCC recently denied the request; it is expected to be appealed.

The Reservists Committee does not maintain a full-time staffed office. It does, however, employ part-time clerical help to handle printing and mailing of the newsletter and other literature. This, and all other expenses, are paid for by contributions of members.

The Committee expects to grow and to represent the interests of Reservists and its members in ending the war in Vietnam.

/s/ Adam Hochschild
ADAM HOCHSCHILD

Subscribed and sworn to before me this 27th day of October, 1970.

/s/ [Illegible]
Notary Public

My commission expires: Oct. 10, 1971

SUPREME COURT OF THE UNITED STATES

No. 72-1188

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

ORDER ALLOWING CERTIORARI—Filed April 23, 1973

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1973

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions involved	2
Statement	3
Reasons for granting the writ	6
Conclusion	14
Appendix A	15
Appendix B	17
Appendix C	37
Appendix D	49

CITATIONS

Cases:

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150 8

Baker v. *Carr*, 369 U.S. 186 8,11

Barlow v. *Collins*, 397 U.S. 159 8

Flast v. *Cohen*, 392 U.S. 83 6,7,9,

Laird v. *Tatum*, 408 U.S. 1 8

Lamm v. *Volpe*, 449 F. 2d 1202 9

Levitt, Ex parte, 302 U.S. 633 6,7,8

Pietsch v. *President of the United States*, 434 F. 2d 861, certiorari denied, 403 U.S. 920 9

Powell v. *McCormack*, 395 U.S. 486 10

Richardson v. *Kennedy*, 313 F. Supp. 1282, affirmed, 401 U.S. 901 10

Richardson v. *United States*, 465 F. 2d 844, pending on writ of certiorari *sub nom. United States* v. *Richardson*, No. 72-885, granted February 26, 1973 .. 10

Roudebusch v. *Hartke*, 405 U.S. 1525 12

Sierra Club v. *Morton*, 405 U.S. 727 6,8

Page

Cases (cont.):

Troutman v. *Shriver*, 417 F. 2d 171, certiorari denied, 397 U.S. 923 9
United States v. *Hartwell*, 6 Wall. 385 12
Velvel v. *Nixon*, 415 F. 2d 236, certiorari denied, 396 U.S. 1062 9

Constitution, statutes and regulations:

United States Constitution:
Article I, Section 2 10
Article I, Section 5, Clause 1 ..... passim
Article I, Section 6, Clause 2 ..... passim
10 U.S.C. 267(b) 13
10 U.S.C. 273(c) 13
10 U.S.C. 593(b) 13
10 U.S.C. 672(a) 13
10 U.S.C. 802 13
10 U.S.C. 802(3) 13
10 U.S.C. 802(5) 13
10 U.S.C. 1161(a)(b) 13
10 U.S.C. 1163(a),(b) 13
10 U.S.C. 1331 13
National Defense Act of 1930, 5 U.S.C. 2105(d), Section 37 12
Department of Defense Directives:
1200.7 (July 2, 1970) 6
1215.6 (June 12, 1971) 13
1235.9 (September 13, 1967) 13

Miscellaneous:

6 Cannon, *Precedents of the House of Representatives*, (1936) 12,14
48 Comp. Gen. 699 (1969) 13
109 Cong. Rec. 10000-10002 12

Page

Miscellaneous (cont):

Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. L. 103 (1968) 11

Federalist, The (1852 ed.):

No. 52 11

No. 76 11

1 Hinds, *Precedents of the House of Representatives*, (1907) 12

H. Rep. No. 2205, 55th Cong., 3d Sess. 14

H. Res. 353, 88th Cong., 1st Sess. 12

H. Res. 369, 88th Cong., 1st Sess. 12

H. Res. 377, 88th Cong., 1st Sess. 12

Note, *Constitutional Law—Standing of United States Citizens QuA Citizens to Bring Public Actions in the Federal Courts—Article I, Section 6, Clause 2*, 19 Wayne L. Rev. 221 (1972) 8

Note, *Reservists in Congress*, 50 Tex. L. Rev. 509 (1972) 14

Recent Decisions, Constitutional Law, Reservists Committee to Stop the War v. *Laird*, 40 Geo. Wash. L. Rev. 542 (1972) 12

S. Res. 142, 88th Cong., 1st Sess. 12

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense, and the Secretaries of the Army, Navy and Air Force, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals (App. A, *infra*, pp. 15-16) was entered without an opinion. The opinion of the district court (App. B, *infra*, pp. 17-36) is reported at 323 F. Supp. 833.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1972. On January 26, 1973, the Chief Justice extended the time within which to file a petition for a writ

of certiorari to and including February 28, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether respondents have standing, either as citizens or as federal taxpayers, to challenge the right of congressmen to hold commissions in the Armed Forces Reserves as violating Article I, Section 6, Clause 2 of the Constitution, which prohibits any Senator or Representative from "holding any Office under the United States * * * during his Continuance in Office."

2. Whether the present suit contesting the Reserve status of members of Congress raises only a political question concerning a congressman's qualifications, which under Article I, Section 5, Clause 1 of the Constitution is a matter reserved to the Legislative Branch.

3. Whether membership in the Ready, Retired and Standby Reserves constitutes an "Office under the United States" within the meaning of Article I, Section 6, Clause 2 of the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 5, Clause 1 of the Constitution provides in pertinent part:

> Each House shall be the Judge of the Elections, Returns, and Qualifications of its own members * * *.

Article I, Section 6, Clause 2 of the Constitution provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments

whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

STATEMENT

This class action was commenced in the United States District Court for the District of Columbia by a national association, Reservists Committee to Stop the War, and several named members thereof, seeking a judicial declaration that all members of the United States Congress who hold commissions in the Armed Forces Reserves are in violation of Article I, Section 6, Clause 2 of the United States Constitution.[1] The complaint asks that defendants, the Secretary of Defense and the Secretaries of the Army, Navy and Air Force, be ordered to remove all active congressmen from the Reserve rolls, be enjoined permanently from adding newly-elected congressmen to the Reserve rolls, and be required to reclaim any reservists' pay that members of Congress may have received during their terms in office. Entitlement to such relief is grounded on the claim that the Reserve status of members of Congress adversely affects plaintiffs, both individually and as a class, by depriving them of "the unbiased consideration by the Congress and its members of measures before the Congress affecting the military establishment and appropriations therefor, including appropriations for compensation and pensions for members of the Reserves, and measures relating to military action, war and peace" (App. C, *infra*, p. 42).

---

[1] The complaint, which is set forth at App. C, *infra*, pp. 37-48, alleges that the Committee is comprised of present and former reservists who oppose the United States' involvement in Vietnam. The individual plaintiffs include the Committee's co-chairman, two officers of the Naval Reserve, an enlisted member of the Air Force Reserve and an enlisted member of the Army Reserve.

No member of Congress was made a party to the suit. The class allegedly being represented consists of all officers and enlisted members of the Reserves who are not members of Congress, all other citizens and taxpayers of the United States, and, in addition, any person who, although neither a reservist, a citizen, nor a taxpayer, opposed the United States' military involvement in Vietnam (*id.* at 41-42).

Both sides moved for summary judgment. Defendants argued (1) that plaintiffs lacked standing to challenge the Reserve status of congressmen, (2) that the question raised, moreover, concerned only the "qualifications" of Senators and Representatives and thus was not a proper subject for the judiciary under Article I, Section 5, Clause 1 of the Constitution, and finally (3) that membership in the Ready, Retired and Standby Reserves was, in any event, not an "Office under the United States" within the meaning of Article I, Section 6, Clause 2 of the Constitution. Following a hearing, the district court granted plaintiffs' motion for summary judgment insofar as it sought a declaratory judgment that members of Congress are "ineligible to hold a commission in the Armed Forces Reserve during [their] continuance in office" (App. B, *infra*, p. 36). The plaintiffs' motion was denied, however, with respect to the claims for injunctive relief and for reclamation of reservists' pay.[2]

---

[2] In declining to grant injunctive relief, the court noted that it "must take into account the importance of its action to persons not before the Court, and the fact that any resolution of the matter must necessarily involve coordinate branches of the Government." "In the absence of an urgent necessity," the court stated, it would assume that "Congress and the Executive" will "accommodate themselves voluntarily to the decision * * * having due regard for the special status of Congressmen then seated" (App. B, *infra*, pp. 34-35).

The court held that plaintiffs lacked standing as reservists and as federal taxpayers but had standing as citizens. Observing that "in this Circuit the concept [of standing] has now been almost completely abandoned" (App. B, *infra*, p. 27), the court concluded that "the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the constitutional provision involved" (*id.* at 31). "[I]f these plaintiffs cannot obtain judicial review of defendants' action," it stated (*ibid.*), "then as a practical matter no one can."

The issue presented, it further held (App. B, *infra*, pp. 31-34), was a proper matter for judicial review, notwithstanding that Article I, Section 5, Clause 1 of the Constitution "commits to Congress the decision whether any individual is qualified to sit in Congress" (*id.* at 34). That provision, the court stated (*ibid.*), "does not bar judicial consideration of the question whether executive action must be taken to carry out a constitutional mandate." In its view, since Article I, Section 6, Clause 2 "was intended simply to declare the incompatibility of a seat in Congress and an office in the Executive or the Judiciary" (*id.* at 32), the courts can properly determine whether congressmen must give up their reserve commissions to satisfy that constitutional command.

Finally, on the merits the district court concluded that Article I, Section 6, Clause 2 had been added to the Constitution as a result of the Framers' belief "in the principle of separation of powers" and their "desire to avoid the example of England, where, the Framers believed, elected officials had been subverted by appointments to office by the Crown" (App. B, *infra*, p. 20). While recognizing "the limited nature of the relationship between the Executive branch and a private citizen who may be an inactive Reserve officer" (*id.* at 26), the court held that member-

ship in the Ready, Retired and Standby Reserves is an "Office under the United States" under Article I, Section 6, Clause 2 "in light of the purpose of the Framers, who erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States" (*ibid.*).[3]

The court of appeals affirmed without opinion, "on the basis of the memorandum opinion of the District Court" (App. A, *infra*, p. 16). The court further stated (*ibid.*): "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962)."

REASONS FOR GRANTING THE WRIT

1. The decisions below represent a significant extension of the decisions of this Court, including *Ex parte Levitt*, 302 U.S. 633, *Flast* v. *Cohen*, 392 U.S. 83, and more recently *Sierra Club* v. *Morton*, 405 U.S. 727, which consistently have held that citizens have no standing to challenge government programs or activities which they consider objectionable unless they show some individualized, personal "injury in fact." Here the district court, although acknowledging that the alleged injury "is hypo-

[3] Department of Defense Directive 1200.7 (July 2, 1970) required the transfer of members of Congress in the Ready Reserve to Retired or Standby Reserve status. At the time of the district court decision 64 members of Congress were in the Retired Reserve, 21 members were in the Standby Reserve on the inactive status list, and 34 members were in the Standby Reserve on the active status list. See the joint appendix in the court of appeals, pp. 22-31, 37-38, 45; a copy of the appendix is being lodged with the Clerk of this Court. The Department of Defense advises us that this total of 119 members of the 92d Congress in Retired and Standby Reserve status has changed to a total of 104 members of the 93d Congress in such Reserve status (see App. D, *infra*, pp. 49-51).

thetical" (App. B *infra*, p. 30), upheld plaintiffs' standing to contest the Reserve status of congressmen "in their capacity as citizens of the United States" (*ibid.*), stating that "in this Circuit the concept [of standing] has now been almost completely abandoned" (*id.* at 27). The summary affirmance by the court below marks the first time that a federal court of appeals has conferred on citizens, simply by virtue of their citizenship, standing to challenge government action on constitutional grounds. The decision, if left undisturbed, is almost certain to spawn a significant number of suits by citizens seeking, contrary to *Flast* v. *Cohen*, *supra*, 392 U.S. at 106, "to employ a federal court as a forum in which to air [their] generalized grievances about the conduct of government or the allocation of power in the Federal System." It therefore warrants review by this Court.

A. In *Ex parte Levitt*, *supra*, a citizen's suit to disqualify a Justice of this Court on the ground that his appointment and confirmation violated the "ineligibility" provision of Article I, Section 6, Clause 2 of the Constitution [4] was dismissed on the ground of lack of standing. The Court rested its decision on the

> * * * established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. * * * [302 U.S. at 634.]

---

[4] The constitutional provision forbids a congressman from resigning to accept any civil office under the United States if the office was created or its emoluments increased during the term for which he was elected.

That principle was recently reaffirmed in *Sierra Club* v. *Morton, supra,* where the Court declined to abandon "the requirement that the party seeking review must have himself suffered an injury," noting that "if any group with a bona fide 'special interest' " could sue in the federal courts, "it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so" (405 U.S. at 739-740). And see *Laird* v. *Tatum,* 408 U.S. 1, 13.[5]

Like *Ex parte Levitt,* the instant case involves a challenge under Article I, Section 6, Clause 2 of the Constitution; here it is to the eligibility of congressmen to hold Reserve commissions. But plaintiffs do not claim they "[have] sustained or [are] immediately in danger of sustaining a direct injury" (302 U.S. at 634) by virtue of the existing practice. Their claim, as the district court observed (App. B, *infra,* p. 31), is based instead on "a general interest common to all members of the public" (302 U.S. at 634), which this Court has consistently held to be insufficient for standing purposes.[6]

---

[5] See also Note, *Constitutional Law—Standing of United States Citizens Qua Citizens to Bring Public Actions in the Federal Courts—Article I, Section 6, Clause 2,* 19 Wayne L. Rev. 221, 235 (1972).

[6] In *Baker* v. *Carr,* 369 U.S. 186, relied on by the courts below, this Court held that individuals whose votes are impaired by the unequal apportionment of election districts have standing because "[t]hey are asserting a 'plain, direct and adequate interest in maintaining the effectiveness of their votes' * * *not merely a claim of the 'right, possessed by every citizen, to require that the Government be administered according to law* * *'" (369 U.S. at 208). Similarly, in *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150, cited by the district court, standing was premised on an allegation of personal economic loss. And see *Barlow* v. *Collins,* 397 U.S. 159.

Not only do the decisions below break with the authoritative precedents of this Court; they also conflict with decisions by other courts of appeals dealing with standing. See *Troutman* v. *Shriver*, 417 F. 2d 171, 174 (C.A. 5), certiorari denied, 397 U.S. 923 (citizen lacks standing to challenge constitutionality of Economic Opportunity Act); *Velvel* v. *Nixon*, 415 F. 2d 236 (C.A. 10), certiorari denied, 396 U.S. 1062 (citizen lacks standing to challenge constitutionality of Vietnam War); *Pietsch* v. *President of the United States*, 434 F. 2d 861 (C.A. 2), certiorari denied, 403 U.S. 920 (same); *Lamm* v. *Volpe*, 449 F. 2d 1202 (C.A.10) (citizen lacks standing to challenge constitutionality of Highway Beautification Act).

B. The judgment of the court of appeals stated (App. A, *infra*, p. 16): "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962)." It is unclear whether the court below considered the decision in *Flast* as support for the position that plaintiffs had standing as *citizens*, on the theory, adopted by the district court, that the Court in that decision "abandoned the requirement of a significant demonstrable injury to the plaintiff" (App. B, *infra*, p. 28), or whether its reliance on *Flast* was intended to suggest, contrary to the district court (*id.* at 29-30), that these plaintiffs also had standing as federal *taxpayers*.[7]

[7] We do not believe the court of appeals disturbed the district court's holding — with which we agree — that plaintiffs lacked standing in their capacity as Reservists (App. B, *infra*, p. 29).

We have already indicated the reasons for our disagreement with the former proposition. With respect to the latter theory, we think that the district court correctly determined that plaintiffs lacked standing as taxpayers, since Article I, Section 6, Clause 2 "cannot fairly be construed as a limitation on the taxing and spending power of Congress," and since "[p]laintiffs' claim in no way depends upon the fact that some Congressmen receive pay as Reservists" (App. B, *infra*, pp. 29-30). There is thus missing in this case "that 'logical nexus between the status [of taxpayers] and the claim sought to be adjudicated' which is required by *Flast*" (*id.* at 30). See *Richardson* v. *Kennedy*, 313 F. Supp. 1282 (W.D. Pa.), affirmed, 401 U.S. 901; but see *Richardson* v. *United States*, 465 F. 2d 844 (C.A. 3), pending on writ of certiorari *sub nom. United States* v. *Richardson*, No. 72-885, granted February 26, 1973.

2. Apart from the standing question, this case presents an issue of first impression concerning which of the coordinate branches of government should resolve the matter of a congressman's eligibility to hold a commission in the Armed Forces Reserves during his elected term. Article I, Section 5, Clause 1 of the Constitution reserves to each House the exclusive authority to pass on the "Qualifications of its own Members * * *." This Court, in *Powell* v. *McCormack*, 395 U.S. 486, 520, n. 41, left open the question whether the term "Qualifications" in that constitutional provision embraces, in addition to age, citizenship and inhabitancy (Art. I, Sec. 2), the ban against "holding any Office under the United States" embodied in Article I, Section 6, Clause 2. That question is squarely presented here and warrants the consideration of this Court.

The courts below concluded that Article I, Section 6, Clause 2 "was intended simply to declare the incompat-

ibility" of a seat in Congress and a position in the Executive or Judicial Branches of government (App. B, *infra*, p. 32); it was not, in their view, meant as a constitutional "qualification" on membership in either House. But the understanding of the Framers appears to be otherwise. The primary purpose for barring congressmen from "'holding any office under the United States'" was to guard "against the danger of executive influence upon the legislative body * * *." *The Federalist*, No. 76 (1852 ed.). Thus, the Framers included among "[t]he qualifications of the elected * * * [which] have been properly considered and regulated by the convention" that a congressman "during the time of his service, must be in no office under the United States." *The Federalist*, No. 52 (1852 ed.).[8]

Whether members of Congress can satisfy that "qualification" if, while seated, they remain in the Retired or Standby Reserves (see n. 3, *supra*), is not a proper subject for judicial scrutiny. Article I, Section 5, Clause 1 contains "a textually demonstrable constitutional commitment of the issue to a coordinate political department" (*Baker* v. *Carr*, *supra*, 369 U.S. at 217). It provides that "Each House shall be the Judge * * *" of such matters.

---

[8] See also Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 J. Pub. Law 103, 111-115 (1968).

Compare *Roudebusch* v. *Hartke*, 405 U.S. 1525.[9] Thus the courts below had no jurisdiction to pass on the "qualification" issue presented in this case. See generally, Recent Decisions, *Constitutional Law, Reservists Committee to Stop the War* v. *Laird*, 40 Geo. Wash. L. Rev. 542, 549-558 (1972).

3. Finally, we submit that the ruling below on the merits, which directly affects a number of congressmen who now hold commissions in the Armed Forces Reserves, presents an important constitutional question which this Court should review. In *United States* v. *Hartwell*, 6 Wall. 385, 393, the term "office" was held to imply "continuing and permanent" duties, "emoluments," "tenure" and "duration." These characteristics, however, have little application in the context of the Retired and Standby Reserves.

Members of such Reserve units do not have continuous and permanent duties; they are not required to train and they are not generally subject to military discipline. Indeed, with but one minor exception pertaining to active-status Standby Reservists—who are each year subject to call

---

[9] Congress has, until now, consistently been deemed to have the responsibility to judge whether its members are disqualified from being seated by virtue of their holding an office under the United States. See, e.g., 1 Hinds, *Precedents of the House of Representatives*, 592-603, 612, 620-632 (1907); 6 Cannon, *Precedents of the House of Representatives*, 67-69 (1936). With specific reference to the Reserve status of Senators and Representatives, Congress has considered whether membership in the Reserves is a basis for disqualification within the meaning of Article I, Section 6, Clause 2 (see S. Res. 142, 88th Cong., 1st Sess. (1963); H. Res. 353, 369, 377, 88th Cong., 1st Sess. (1965)); it has, however, taken no action to disqualify its members on this ground. And see Section 37 of the National Defense Act of 1930, 5 U.S.C. 2105(d), which provides that a Reservist not on active duty or on active duty training does not hold an "office of trust or profit." See also 109 Cong. Rec. 10000-10002 (1963).

for one 15-day period—these Reservists stand on virtually the same footing as all civilians: they can be activated for military duty only if Congress declares war or a national emergency. See 10 U.S.C. 267(b), 672(a), 802.[10] Retired and Standby Reservists also receive no "emoluments." The retirement pay received by Retired Reservists is paid independent of their present status and is "in the nature of a pension." 10 U.S.C. 1331; 48 Comp. Gen. 699, 701 (1969).[11] Moreover, the commissions of Retired and Standby Reservists are "for an indefinite term" and, with certain limitations,[12] are "held during the pleasure of the President" (10 U.S.C. 593(b)).

---

[10] A Retired and inactive-status Standby Reservist may not train. Department of Defense Directive 1235.9, section IV, A, 4 (September 13, 1967). An active-status Standby Reservist may volunteer to train, at his own expense, without pay or allowances. Department of Defense Directive 1215.6, section IV, E, 4 and IV, F, 3 (June 12, 1971). A Reservist would be subject to military discipline if called to duty upon a declaration of war or national emergency, or, in the case of an active-status Standby Reservist, when voluntarily training. A Retired Reservist would also be subject to the Uniform Code of Military Justice when "receiving hospitalization from an armed force." 10 U.S.C. 802(3), (5).

[11] Forty-nine of the 64 congressmen in the 92d Congress in Retired status (C.A. App. 22-31, 37-38, 45) received no pay at all (55 of the 71 congressmen in the 93d Congress in Retired Reserve status also receive no pay, pp. 49-51, *infra.*). Inactive-status Standby Reservists are "not eligible for pay or promotion" (10 U.S.C. 273(c)). Active-status Standby Reservists may earn retirement credit while on voluntary training, and they are eligible for promotion below the general or flag-officer grades. Department of Defense Directive 1215.6 section IV, E, 4 and IV, F, 3 (June 12, 1971); Department of Defense Directive 1235.9, section IV, A, 5 (September 13, 1967).

[12] Limitations on the discharge of Reserve commissioned officers are found in 10 U.S.C. 1161(a) and (b), 1163(a) and (b).

The courts below in deciding that a commission in the Retired and Standby Reserves is an "Office under the United States" unduly expanded the constitutional bar in Article I, Section 6, Clause 2. Clearly a legislator cannot simultaneously hold a cabinet office or a seat on the judiciary, which would permit him both to pass legislation and to enforce or interpret it. Nor could he hold a commission in the Regular Army, which would suggest continuous military duties and a permanent tie to the Executive Branch of government.[13] But a commission in the Retired or Standby Reserves is significantly different. As one commentator recently noted, such a commission, "with its intermittent, noncontinuous duties and its limited relationship with the executive branch, seems neither inherently repugnant to the congressional office nor an encroachment on the independence of the legislative branch." Note, *Reservists in Congress*, 50 Tex. L. Rev. 509, 513 (1972). To characterize it as an "Office under the United States" is, we submit, contrary both to the letter and spirit of Article I, Section 6, Clause 2.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HARLINGTON WOOD, JR.,
Assistant Attorney General.

MORTON HOLLANDER,
LEONARD SCHAITMAN,
Attorneys.

FEBRUARY 1973.

---

[13] See 6 Cannon, *supra*, at p. 66. Compare H. Rep. No. 2205, 53th Cong., 3d Sess., pp. 33, 64.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[No Opinion]

SEPTEMBER TERM, 1972

CIVIL ACTION NO. 1429-70

No. 71-1535

RESERVISTS COMMITTEE TO STOP THE WAR, ADAM HOCHSCHILD, ERNEST NOTAR, BRUCE PHILLIPS, DAVID L. KRANZ AND GEORGE HOLMES

v.

MELVIN R. LAIRD, *Secretary of Defense,* STANLEY R. RESOR, *Secretary of the Army,* JOHN H. CHAFEE, *Secretary of the Navy,* AND ROBERT C. SEAMANS, JR., *Secretary of the Air Force,* APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: SOBELOFF,* Senior Circuit Judge, and WRIGHT and ROBINSON, Circuit Judges.

---

*Of the Fourth Circuit, sitting by designation pursuant to 28 U.S.C. 294(d) (1970).

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the court. *See* Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the judgment of the District Court appealed from in this cause is hereby affirmed on the basis of the memorandum opinion of the District Court. *Reservists Committee to Stop the War* v. *Laird*, D. D.C., 323 F. Supp. 833 (1971). We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962).

Per Curiam

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1429-70

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL., PLAINTIFFS

v.

MELVIN LAIRD, ET AL., DEFENDANTS

MEMORANDUM OPINION

This case presents the discrete question whether under Article I, Section 6, Clause 2 of the Constitution of the United States a person may at the same time be a member of Congress and hold a commission in the Armed Forces Reserve. The meaning and effect of this constitutional provision have never before been determined by a court. There is no factual dispute, and the legal issue has been tendered on cross-motions for summary judgment and has been fully briefed and argued.

Article I, Section 6, Clause 2 of the Constitution reads in its entirety as follows:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such Time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Plaintiffs ask the Court to implement this constitutional requirement by declaratory judgment and by injunction against the Secretary of Defense and the Secretaries of

the Army, Navy, and Air Force, upon the undisputed showing that at the present time 117 Senators and Representatives hold commissions in the Army, Navy, Air Force or Marine Corps. Reserves subject to the rights and duties of reservists as specified in 10 U.S.C. chs. 11 and 39. This action does not seek to remove any Congressman from his elected office, nor to declare that any Congressman lacks the qualifications for the Senate or the House of Representatives. Rather it proceeds on the assumption that the Executive branch can be directed to take steps that will eliminate any office inconsistent with the constitutional mandate.

Initially a determination must be made as to whether plaintiffs have standing to bring this action. The issue then becomes whether a commission in the Reserve is an "office under the United States." For reasons that will appear, the Court is satisfied that plaintiffs have the requisite standing, and a determination is thus required whether a Reserve commission is within the ambit of "office" as that term is used in the Constitution. Because the Clause must be considered on the merits and its meaning and effect has some bearing on resolution of the standing question, the Court will first consider the merits before turning to a more detailed discussion of the justiciability of the controversy and the nature of the relief that shall be granted in this case.

I. *The Meaning and Purpose of the Clause*

At the outset it will assist an understanding of the issues here presented to review briefly the origin and intended meaning of the constitutional provision this litigation puts into focus. The sources of this review are primarily the proceedings of the Constitutional Convention and certain passages in the Federalist Papers.

The wording of the Clause as reported to the Constitutional Convention by the Committee of Detail was as follows:

> The members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected: and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards.*

It will be noted that this clause contained two distinct prohibitions: one against the simultaneous holding of incompatible offices, and the other against the appointment of a member of Congress to executive office during the term for which he was elected and, in the case of Senators, for one year thereafter.

The wisdom of the "incompatibility clause," barring the simultaneous holding of executive and legislative office, was universally accepted throughout the debates in the Convention. The discussion turned around the desirability of the "ineligibility clause," which prohibited a member of either House from resigning his legislative duties to accept executive office. While this discussion was therefore a bit tangential to the key issue presented here—that of the incompatibility of offices—it is highly informative as to the true meaning and purpose of that portion of the final Article which directs that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

---

*2 Farrand, Records of the Federal Convention of 1787, at 180 (1911). A similar provision in the Randolph Resolutions, or Virginia Plan, would have barred members of Congress from both federal and state offices. 1 *id.* at 20.

This clause had its origin in a strong belief by the Framers in the principle of separation of powers, and a desire to avoid the example of England, where, the Framers believed, elected officials had been subverted by appointments to office by the Crown. This view had such strength that strong objections were raised to weakening the original proposal by amendment in any respect.

A few of many instances may be cited to give the flavor of the debates. Elbridge Gerry warned:

> It appears to me, that we have constantly endeavored to keep distinct the three branches of government; but if we agree to this motion, it must be destroyed by admitting the legislators to share in the executive, or to be too much influenced by the executive, in looking up to him for offices. (1 Farrand at 393.)

To a suggestion that "in this instance we refine too much," Mr. Butler responded:

> We have no way of judging mankind but by experience. Look at the history of the government of Great Britain, where there is a very flimsy exclusion—Does it not ruin their government? A man takes a seat in parliament to get an office for himself or friends, or both; and this is the source from which flows its great venality and corruption. (1 Farrand at 379.)

Mr. Mason was also conscious of the British experience:

> I admire many parts of the British constitution and government, but I detest their corruption. Why is the power of the crown so remarkably increased the last century? A stranger, by reading their laws, would suppose it considerably diminished; and yet, by the sole power of appointing the increased officers of government, corruption pervades every village in the kingdom. If such a restriction should abridge the right

> of election, it is still necessary, as it will prevent the people from ruining themselves; and will not the same causes here produce the same effects? I consider this clause as the cornerstone on which our liberties depend—and if we strike it out we are erecting a fabric for our destruction. (1 Farrand at 380-381.)

In response to one amendment offered to weaken the eligibility clause, Colonel Mason "ironically proposed to strike out the whole section, as a more effectual expedient for encouraging that exotic corruption which might not otherwise thrive so well in the American soil." 2 Farrand at 284.

Alexander Hamilton eloquently underlined the essentiality of barring Congressmen from holding other office while they retained their membership, even while arguing against further exclusions:

> I confess there is danger where men are capable of holding two offices. Take mankind in general, they are vicious—their passions may be operated upon. [But] we have been taught to reprobate the danger of influence in the British government, without duly reflecting how far it was necessary to support a good government . . . Our prevailing passions are ambition and interest; and it will ever be the duty of a wise government to avail itself of these passions, in order to make them subservient to the public good—for these ever induce us to action. Perhaps a few men in a state, may, from patriotic motives, or to display their talents, or to reap the advantage of public applause, step forward; but if we adopt the clause, we destroy the motive. I am therefore against all exclusions and refinements, except only in this case: that when a member takes his seat, he should vacate every other office. (1 Farrand at 381-382.)

The result of the debates was a compromise, first proposed by Madison and later slightly modified. It maintained inviolate the incompatibility of the offices, and limited the ineligibility provision governing offices Congressmen on resignation could accept to offices created or the emoluments of which were increased by Congress during the member's term in office. The purpose of the provision was succinctly stated by Madison in the Federalist No. 76, where in discussing the possibility of collusion between the President and the Senate on executive appointments, he quoted the entirety of Article I, Section 6, Clause 2, in its final form, as establishing "important guards against the danger of executive influence upon the legislative body . . ."

Significantly, some of those who had argued against the original broad exclusion were specifically concerned with the availability of the membership for military service. James Wilson, for example, feared "the fatal consequence in time of war, of rendering perhaps the best Commanders ineligible." 1 Farrand at 376. Gouverneur Morris agreed, and proposed an exception for offices in the Army and Navy. 2 *id.* at 286, 289. It was perhaps these considerations which led to the compromise which in effect permitted Congressmen to resign and accept certain military or other offices.

Thus the Clause has consistently declared an incompatibility of legislative and executive or judicial offices, rather than a standing qualification (such as age, citizenship or residency) for membership in Congress. It was designed to ensure the integrity of a particular form of government, by preventing encroachments upon the separation of powers; and any violation of the Clause was seen to injure all citizens of the United States, rather than a particular group or the constituents of a particular Congressman.

II. *Status of Reserve Officers under the Clause.*

Against this background the Court turns to a consideration of the controversy over whether a commission in the Reserve is an "office under the United States." Plaintiffs sought extensive discovery into Pentagon files to determine the extent of the activities of each Congressman in the Reserve to develop his perquisities from and duties toward the Executive resulting from his commission, with particular attention to those members who have long served as members of the Armed Services Committees of the House and Senate. The Court refused to permit such inquiries. The question of whether or not a Reserve commission is "an office under the United States" can be resolved on the basis of the controlling statutes and decisions, without more, since a showing of actual favoritism or conflict of interest is not necessary to effectuate the purpose of the Clause.

The Reserve is divided in "Ready," "Standby," and "Retired" components. With a single exception, all Congressmen in the Reserve are classified in either Standby or Retired Reserve components.* Congressmen in Standby status do not receive pay, but may elect to

---

*There are, in addition, two Congressmen who hold commissions in the Army National Guard. Though the Army National Guard is a "Reserve component," 38 U.S.C.§ 101(27), and its officers are "federally recognized," 32 U.S.C. §§ 307, 310, appointments to office in the Guard are made by the governors of the various states. The Secretary of Defense and the other defendants, therefore, do not have the power to remove the commissions of those Congressmen who are officers in the Guard, and no cause of action is stated with respect to those two Congressmen. No determination is made herein as to whether a commission in the National Guard is an "office under the United States" for purposes of Article I, section 6 of the Constititution.

participate in training and earn promotion and retirement credits. Congressmen in Retired Reserve may receive pay if otherwise eligible, though fewer than twenty do so. All members of the Reserve, including those in Retired status, are subject to call to active duty without their consent in time of war or national emergency.

The term "office" was defined in *United States* v. *Hartwell,* 6 Wall. (73 U.S.) 385, 393 (1867), as "a public station, or employment, conferred by the appointment of Government. The term embraces the ideas of tenure, duration, emoluments, and duties." The question whether a commission in the 1916 National Guard fit this definition was considered at length by the House Committee on the Judiciary. After outlining the status and duties of an officer in the Guard and reviewing the legislative precedents with respect to Congressmen whose seats were declared vacant by virtue of their acceptance of an Army or Militia commission, the Committee concluded that a Congressman was not entitled to hold a commission in the National Guard. H.R. Rep. No. 885, 64th Cong., 1st Sess. (June 29, 1916). A commission in the modern Armed Forces Reserve cannot fairly be distinguished from a commission in the 1916 National Guard for purposes of Article I, Section 6, Clause 2.* The question is, therefore, whether the reasoning of the Committee, consistent with the holding of the Supreme Court, was erroneous, or

---

*Much like the 1916 National Guard, officers of the Reserve are subject to call and assignment by the President; their salaries and expenses are paid from federal funds; they are subject to the Uniform Code of Military Justice while on duty or while in Retired status; they enlist for definite terms; and they subscribe to the oath of office required of all civil servants. Unlike the Guard, Reserve officers are appointed by the President and retain their commissions at his pleasure.

whether subsequent events or rulings render it an anachronism. It is clear that such is not the case.

Defendants rely primarily on 5 U.S.C. § 2105(d), enacted in slightly different form in 1930. It reads:

> A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit . . . under . . . the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

Were this statute intended by Congress to exempt Reserve officers from the terms of Article I, Section 6 of the Constitution, that determination should receive careful consideration by the Court. The legislative history of the statute, however, precludes such an interpretation. In the exceedingly brief floor debate on the bill, Senator Couzens suggested that it was an attempt to remove a Reserve officer from the definition of "office" as used in the Constitution, but admitted that the Chairman of the Military Affairs Committee, Senator Reed, "doubts whether this proposed legislation will remedy the situation." 72 Cong. Rec. 11881, 71st Cong., 2d Sess. (June 27, 1930). Senator Walsh then objected to the bill as "too sweeping." When the bill came to a vote later in the day, Senator Reed reported that he had had time to explain the bill to Senator Walsh, and that Walsh "had no further objection." *Id.* at 11892. The narrow purpose of the bill was explained in the House committee report, which stated that the statute was enacted "to remedy a condition occasioned by a ruling of the Attorney General that prevents Reserve officers, who are attorneys at law, from practicing before the Treasury Department or from performing other work that the law forbids officers of the

Government to undertake." H. R. Rep. No. 1884, 71st Cong., 2d Sess., at 2 (1930).

Defendants also cite *Simmons* v. *United States*, 55 Ct. Cl. 56 (1920), for the proposition that a Reserve officer is not an "officer under the United States." In that case, the Court of Claims granted the motion of an attorney who was a Reserve officer for leave to prosecute a claim in that court against the United States, despite the provisions of Section 5498 (now 18 U.S.C. § 205) which barred officers of the United States from doing so. This decision was in accord with the later determination of Congress embodied in 5 U.S.C. § 2105(d), but like that statute, had no effect on the scope or interpretation of the constitutional bar against Congressmen holding incompatible offices.

Implicit in the *Simmons* case and the 1930 statute is undoubtedly a recognition of the limited nature of the relationship between the Executive branch and a private citizen who may be an inactive Reserve officer. Where Congress is concerned, however, the incompatibility clause must be applied in light of the purpose of the Framers, who erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States. Moreover, given the enormous involvement of Congress in matters affecting the military, the potential conflict between an office in the military and an office in Congress in not inconsequential.* The words of the House Committee on the Judiciary in 1916 have lost none of their force:

---

*It is relevant in this connection to note that while less than one-fourth of the members of the 91st Congress were Reserve officers, those members were disproportionately represented on the Committees concerned with military affairs. Reserve officers constituted more

It may be claimed, however, by some that under the Act of Congress federalizing the militia of the several States there are numerous small offices created of little importance, and, therefore, outside of the intent of the framers of this clause of the Constitution. But no line can be drawn between the large and small office. The Constitution prohibits a Member of Congress from holding "any" office under the United States while a member of either House. If a Member should hold any office under the United States, the prohibition of the Constitution at once intervenes and declares that he shall not "be a Member of either House."

III. *Standing.*

The issue now before the Court has remained unresolved these many years in part because of earlier concepts in the law that rigidly restricted standing to sue. In recent years the Supreme Court has greatly expanded the concept of standing and in this Circuit the concept has now been almost completely abandoned. A review of the decisions is appropriate in view of defendants' vigorous challenge on the basis of lack of standing.

Many of the technicalities which historically surrounded the concept of standing were cleared away by the Supreme Court in *Flast* v. *Cohen*, 392 U.S. 83 (1968). The Court focused the question of standing in the constitutional sense upon "whether the dispute sought to be adjudicated will be presented in an adversary context and in a form

---

than half the membership of the Senate Armed Services Committee (including one Major General in the Army Reserve, retired with pay, who was President of the Reserve Officers' Association); one-third of the House Armed Services Committee and two-thirds of the House Veterans Affairs Subcommittee on Compensation and Pension.

historically viewed as capable of judicial resolution." *Id.* at 101. An adversary context was said to be ensured where the complainants have "a personal stake in the outcome of the controversy." In many cases, that personal stake is readily apparent, as where a corporation alleges economic injury from unfavorable agency action, or where members of a minority group allege discrimination in the allocation of government services. In other cases, however, the nature of the alleged injury is diffuse or intangible. In a long series of cases prior to *Flast*, where the personal stake and injury were not apparent, this circumstance was sufficient to deny standing to individual citizens and thus effectively to preclude judicial review of a challenged action.

The Court in *Flast*, however, abandoned the requirement of a significant demonstrable injury to the plaintiff and substituted a test designed to ensure that the plaintiff, despite the generality of his alleged injury, is a "proper and appropriate party to invoke a federal court's jurisdiction." 392 U.S. at 103. The test announced is "whether there is a logical nexus between the status asserted and the claim sought to be adjudicated." *Id.* at 102. If this test is satisfied, the Court said, a complainant has standing in the sense that his claim presents a "case or controversy" under Article III of the Constitution.

The question of standing still involves what the Supreme Court has termed a "rule of self-restraint" designed to avoid passing on premature or ill-focused constitutional claims. *Barrows* v. *Jackson*, 346 U.S. 249, 255 (1953). The latest expression of such a "rule" is found in *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). The Court there noted that the question of standing concerns not only the "case" or "controversy" test, but "the question

whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

Plaintiffs—an association of present and former Reservists organized to oppose the war in Vietnam, and five individual members of that organization—purport to represent several different "classes" in this action. Standing is claimed as Reservists, as persons opposed to the Vietnam War, as taxpayers and as citizens. Only their status as citizens gives standing in this case. Plaintiffs in their capacity as Reservists allege that they are injured by favoritism toward Congressmen in assignments, promotion, and perquisites within the Reserves. No evidence has been offered in support of this claim. The Court barred discovery on the question. Even were these allegations proved, it is doubtful whether plaintiffs' interests as Reservists are within the zone of those interests which the Clause was designed to protect. Nor is plaintiffs' opposition to the war in Vietnam sufficient to give standing in this case. That controversy is irrelevant to the issues presented, and the Court rejects any suggestion that the relief requested can responsibly be said to have any bearing whatsoever on the outcome of that controversy.

Plaintiffs' standing as taxpayers must also fail under *Flast* v. *Cohen, supra,* for the constitutional provision which they invoke cannot fairly be construed as a limitation on the taxing and spending power of Congress. The Clause here in issue is a limitation on the right of Congressmen to hold other offices which are incompatible under the separation-of-powers doctrine. While Congressmen in their positions as Reservists also receive funds from the public treasury, it is not the expenditures thus incurred, but the possibility of undue Executive influence over the

Congress, which the Constitution seeks to forbid. Plaintiffs' claim in no way depends upon the fact that some Congressmen receive pay as Reservists, and hence there is not that "logical nexus" between the status [of taxpayers] and the claim sought to be adjudicated" which is required by *Flast*.

Plaintiffs do, however, have standing to sue in their capacity as citizens of the United States. There are undoubtedly very few instances in which plaintiffs who assert merely the undifferentiated interest of citizens have a personal stake in the outcome sufficient to support standing in the constitutional sense.* Several considerations move the Court to hold that plaintiffs have standing as citizens in this instance. First, while any injury which might result from Congressmen holding Reserve commissions is hypothetical, the hypothesis is not concocted by plaintiffs but underlies the constitutional provision itself. Like a conflict-of-interest statute, the constitutional bar addresses itself to the potential for undue influence rather than to its realization. *Cf. Board of Governors* v. *Agnew*, 329 U.S. 441, 449 (1947). The Court will not lightly conclude that a constitutional provision so highly regarded and hotly debated by the Framers serves no real purpose.

Second, the issue tendered is a narrow one and involves a precise self-operative provision of the Constitution. This is not a case where plaintiffs seek "to employ

---

*There have been suggestions that a challenge to governmental action in violation of the Establishment Clause might be such a case. *See Flast v. Cohen, 392 U.S. 83, 115-116 (1968) (Fortas, J., concurring); Flast v. Gardner, 271 F. Supp. 1, 8 (S.D.N.Y. 1967) (Frankel, D.J., dissenting); Committee for Public Education and Religious Liberty v. Rockefeller, 39 U.S.L.W. 2958 (S.D.N.Y. Jan. 28, 1971). But see* Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. pa. 1970).

a federal court as a forum in which to air [their] generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen, supra,* at 106.

Third, the interest in maintaining independence among the branches of government is shared by all citizens equally, and since this is the primary if not the sole purpose of the bar against Congressmen holding executive office, the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the constitutional provision involved.

Finally, there can be no doubt that this is a "case or controversy" in the common meaning of those words; the parties sharply conflict in both their interests and their views, and the case was ably briefed and argued. It is not irrelevant to note that if these plaintiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can.*

IV. *Other Contentions as to Justiciability.*

The Government also contends that the constitutional prohibition against Congressmen holding executive office states only a qualification for membership in Congress, not a qualification for executive office. From this premise, it is concluded that no cause of action lies against the Secretary of Defense or other executive officials to

*Defendants suggest that the proper procedure to test the legality of a Congressman's commission in the Reserves is *quo warranto.* Such a procedure could be invoked only by an individual who claims title to the same position held by a Congressman. It is clear that, even if the holding of executive office be deemed a disqualification which can be asserted against a Congressman in *quo warranto,* the contingency of such a suit is remote and is unrelated to the question whether a general public interest is being harmed by the challenged practice of allowing Congressmen to hold Reserve commissions.

remove Congressmen from their offices in the Reserve; the only remedy under the provision is to remove the Reserve officer from his seat in Congress, and since each House is "the Judge of the Qualifications of its own Members" (Article I, Section 5), no remedy may be sought in any court. If the Government were correct in its initial premise, the case would seem to present a nonjusticiable "political question," in that there would exist "a textually demonstrable constitutional commitment of the issue to a coordinate political department. . . ." Baker v. *Carr*, 369 U.S. 186, 217 (1962).*

In support of their argument, defendants point first to the wording of the Clause itself, which makes a "Person holding any Office" ineligible to sit in Congress, and further suggest that the change in wording from the clause as originally reported to the Convention—making members of either House "ineligible to and incapable of holding any office"—indicates that the Framers intended for enforcement of the provision to come exclusively through removal of an officer from his seat in Congress. However, the records of the Convention, as previously discussed, reveal that the Clause was intended simply to declare the incompatibility of a seat in Congress and an office in the Executive or the Judiciary. Though the first part of what is now Article I, Section 6, Clause 2—dealing with the

---

*In Powell v. McCormack, 395 U.S. 486 (1969), the Supreme Court noted that a House determination as to whether a member possessed the three "standing qualifications" for Congress (age, citizenship, and residency) might well be insulated from judicial review by the political question doctrine. The Court raised but did not reach the question whether the bar against Congressmen holding other offices under the United States is a "qualification" of which each House is the sole judge under Article I, Section 5. The question is answered in the affirmative by one commentator. Dionisopoulos, A Commentary on the Constitutional Issues in the Powell and Related Cases, 17 J. Pub. Law 103, 115 (1968).

eligibility of Congressmen for appointment to executive office—was debated at length, the part which declared the incompatibility of the offices was never questioned. The final wording of the Clause was drafted by the Committee of Eleven to whom the provision had been referred after the debate on Madison's compromise. 2 Farrand at 483. There is no indication that its changes were intended to have any effect on the substance of the incompatibility provision.

Defendants underline their argument by reference to the examples of Congressional enforcement of the constitutional provision in the Nineteenth and early Twentieth Centuries.* In each of these instances, however, it appears that the member whose seat was declared vacant had accepted a commission during his term in office. The Court's attention has not been directed to any case in which an elected Congressman was not seated by reason of an office he held at the time he first entered Congress; the congressional precedents involve members whose seats were declared vacant upon their acceptance of an appointment to another office while serving in Congress. It is the general rule that in the case of incompatible offices, "acceptance of the second office vacates the first." *Right of a Representative in Congress to Hold Commission in National Guard,* H.R. Rep. No. 885, 64th Cong., 1st Sess., at 4 (1916). Thus it is clear that defendants, as the superiors of Reserve officers within

---

*Examples of cases in which Senators and Representatives were expelled from Congress upon their acceptance of military office may be found in 1 Hind's Precedents of the House of Representatives, §§ 486-499 (1907), and 6 Cannon's Precedents of the House of Representatives, §§ 60-64 (1936). Congress has also on occasion solicited the opinion of the Attorney General with respect to individual cases arising under the Clause. See, *e.g.*, 40 Ops. Att'y Gen'l 201 (1943); 40 Ops. Att'y Gen'l 301, 303 (1949).

the Executive branch, have the right and the power to remove Congressmen from the Reserve offices they held at the time of their election, and that their failure to do so is subject to judicial review.

There is no basis for defendants' contention that the issue of a Congressman's entitlement to hold executive office has been committed by the Constitution to either the Legislative or the Executive departments. Undoubtedly, Article I, Section 5 commits to Congress the decision whether any individual is qualified to sit in Congress, but this does not bar judicial consideration of the question whether executive action must be taken to carry out a constitutional mandate.

v. *Relief.*

Plaintiffs are entitled upon the Court's finding to a declaratory judgment that Article I, Section 6 prohibits any Congressman from holding a commission in the Armed Forces Reserve during his term in office. It does not follow, however, that injunctive relief is necessarily appropriate. See *Powell* v. *McCormack*, 395 U.S. 486,499 (1969). In considering the prayer for an injunction, the Court must take into account the importance of its action to persons not before the Court, and the fact that any resolution of the matter must necessarily involve coordinate branches of the Government. A number of factors impel the Court to deny injunctive relief in this case.

Congressmen have held commissions in the Reserve for a number of years, and though the matter has occasionally troubled both the Department of Defense and some members of Congress, the right of Congressmen to

hold commissions has not been clarified.* In the absence of an urgent necessity, and none is shown, the Court is loathe to take injunctive action which might prejudice the rights of Congressmen now seated who in some cases have been members of the Reserve for many years and may leave Congress at the end of their present terms. There is more than one way to remove the incompatibility. Individual Congressmen should be free to make their own choice. In any event, if the issue of incompatibility is finally determined on appeal consistent with the decision, there is no reason to believe that Congress and the Executive will be unable to accomodate themselves voluntarily to the decision, and to phase out incompatibility having due regard for the special status of Congressmen then seated.

An order granting the prayer for a declaratory judgment and denying injunctive and other relief requested by plaintiffs is attached.

GERHARD A. GESELL
United States District Judge

APRIL 2 1971.

---

*See the remarks of Senator Goldwater, 109 Cong. Rec. 13211-14 (1963). Senator Goldwater's proposal that the Senate investigate and rule upon the question was not accepted. The Department of Defense has several times issued special directives concerning the status of Congressmen in the Reserve, but has never suggested that they resign their commissions.

In the United States District Court
for the District of Columbia

Civil Action No. 1429-70

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.,
PLAINTIFFS,

v.

MELVIN LAIRD, ET AL., DEFENDANTS.

ORDER

Upon consideration of cross-motions for summary judgment, the memoranda filed in support thereof, and the oral argument of counsel, and the Court having this day filed a Memorandum Opinion containing its conclusions of law based on the undisputed facts, it is this 2 day of April, 1971,

ORDERED that plaintiffs' motion for summary judgment is granted as to the claim for a declaratory judgment, and it is hereby declared that Article I, Section 6, Clause 2 of the Constitution renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office; and it is further

ORDERED that plaintiffs' motion is denied, and defendants' motion is granted, as to all claims for relief other than such declaratory judgment; as to these claims the complaint is dismissed.

GERHARD A. GESELL
United States District Judge

APPENDIX C

In the
United States District Court
for the District of Columbia

RESERVISTS COMMITTEE TO STOP THE WAR
P.O. Box 4398
Berkely, California 94704

ADAM HOCHSCHILD
2711 Virginia Street
Berkeley, California 94709;

ERNEST NOTAR
2541 Regent Street
Berkeley, California 94704;

BRUCE PHILLIPS
2131 Blake Street
Berkeley, California 94704;

DAVID L. KRANZ
675 Creston Road
Berkeley, California 95708

GEORGE HOLMES
5964 Racine Street
Oakland, California 94609,

PLAINTIFFS,

v.

MELVIN R. LAIRD, Secretary of Defense
The Pentagon
Washington, D.C. 20301;

STANLEY R. RESOR, Secretary of the Army
The Pentagon
Washington, D.C. 20301;

JOHN H. CHAFFE, Secretary of the Navy
The Pentagon
Washington, D.C. 20301;

ROBERT C. SEAMANS, JR., Secretary of the Air Force
The Pentagon
Washington, D.C. 20301,

DEFENDANTS.

COMPLAINT FOR INJUNCTION DECLARATORY JUDGMENT AND ORDER IN THE NATURE OF MANDAMUS

1. This is an action against the Secretary of Defense and the three service Secretaries to compel them to strike from the rolls of the United States Army, Navy, Air Force, Coast Guard and Marine Corps Reserves and the army and Air National Guard (the Reserves) all members of the United States Senate and House of Representatives presently listed as members of the Reserves, and for a declaratory judgment that such membership is an office under the United States that Article I, section 6, clause 2 of the United States Constitution prohibits members of Congress to hold.

Jurisdiction and Venue

2. This action arises under Article I, section 6, clause 2 of the United States Constitution. This Court has jurisdiction under 28 U.S.C. 1331, 1361, and 2201, and 11 D.C. Code 521. Venue of this action is the District of Columbia by reason of the official residence of all the defendants therein.

Plaintiffs

3. Plaintiff Reservists Committee to Stop the War (Committee) is a national unincorporated association of present and former officers and enlisted members of the Reserves, organized for the purpose of opposing the miltary involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to persuade the Congress of the United States and all members of the Congress to take all steps necessary and appropriate to end that involvement. It brings this action on its own behalf and on behalf of all of its members and of all other citizens of the United States who share its views and aims. Committee has its headquarters in and is a resident of California.

4. Plaintiff Adam Hochschild is co-chairman of the Reservists Committee to Stop the War.

5. Plaintiff Ernest Notar is an officer in the Reserves, specifically the Naval Reserve, and is in active Ready Reserve status.

6. Plaintiff Bruce Phillips is an enlisted member of the Reserves, specifically the Air Force Reserve, and is in active Ready Reserve status.

7. Plaintiff David L. Kranz is an officer in the Reserves, specifically the Naval Reserve, and is in active Ready Reserve status; but on June 3, 1970, he expects to be transferred to inactive Standby Reserve status.

8. Plaintiff George Holmes is an enlisted member of the Reserves, specifically the Army Reserve, and is in active Ready Reserve status.

9. All the individual plaintiffs are United States citizens and taxpayers and are residents of California. All share the views and aims of and are members of the Committee.

Class Action

10. This is a class brought by the plaintiffs on their own behalf and on behalf of all others similarly situated pursuant to Rules 23(a) and 23(b)(1) and (2), F.R. Civ.P.

(a) The class represented by plaintiff Committee, its members and the named individual plaintiffs together consists of persons opposed to the United States military involvement in Vietnam and purposing to use lawful means, including communication with and persuasion of members of Congress, to end that involvement. . .

(b) The classes represented by the named individual plaintiffs alone consist of (i) all officers and enlisted members of the Reserves who are not members of Congress and (ii) all citizens and taxpayers of the United States.

11. Each of the classes described in paragraph 10 of this complaint is so numerous that joinder of all members is impracticable; (2) there are questions of law or of fact common to the class; (3) the claims of the representative parties are typical of the claims of the class; (4) the representative parties will fairly and adequately protect the interests of the class; (5) the parties opposing the class have acted on grounds generally applicable to the class; (6) the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications; and (7) questions of law and fact common to members of the class predominate over any questions affecting only individual members so that a class action is superior to other available methods for the fair and efficient adjucation of the controversy.

Defendants

12. Defendant Laird is the Secretary of Defense of the United States with administrative authority, under the president as Commander in Chief, over the Armed Forces of the United States, including the Reserves.

13. Defendants Resor, Chafee and Seamans are the Secretaries of the Army, Navy and Air Force, respectively, with administrative authority, under the President as Commander in Chief and under the Secretary of Defense, over the armed services within their respective jurisdictions, including the respective Reserves.

14. The official residence of all the defendants is the District of Columbia.

Rights and Interests of Plaintiffs

15. Plaintiff Committee and the named individual plaintiffs and the class they represent have an interest in, a right to and are deprived by the membership in the Reserves of members of Congress of, unbiased consideration by the Congress and its members of their efforts to communicate and persuade the Congress and its members to take action, including voting on germane proposed legislation and resolutions, that may promote their objective of ending the military involvement of the United States in Vietnam.

16. The named individual plaintiffs and the classes they represent

(a) as members of the Reserves who are not members of Congress, have an interest in, a right to, and are deprived of equality of treatment with members of the Reserves who are members of Congress, in respect of

(i) assignments for active duty for training;
(ii) liability for call to active duty in time of war or other emergency; and
(iii) promotion;

(b) as members of the Reserves have an interst in, a right to and are deprived by the membership in the Reserves of members of Congress of, unbiased consideration by the Congress and its members of military appropriations, resolutions approving or disapproving military action, and other measures before the Congress affecting or likely to affect members of the Reserves;

(c) as citizens and taxpayers of the United States have an interest in, a right to and are deprived by the membership in the Reserves of members of Congress of, the unbiased consideration by the Congress and its members of measures before the Congress affecting the military establishment and appropriations therefor, including appropriations for compensation and pensions for members of the Reserves, and measures relating to military action, war and peace.

Facts

17. As of April 16, 1970, there were two members of Congress in Ready Reserve status and 33 in active Standby Reserve status. These 35 attend drills or perform other active duty for training, and accumulate points for retirement pay entitlement under 10 U.S.C. 1332 and similar statutory provisions: as of April 16, 1970, there were 24 members of Congress in inactive Standby Reserve status. As of March 9, 1970, there were 63 members of Congress in Retired Reserve status.

18. Members of the Reserve constitute a dominant minority, in numbers much greater in proportion than

their numbers in proportion to the whole membership of the Senate and of the House of Representatives respectively, in the Armed Services Committees of the Senate and the House of Representatives; the Foreign Affairs Committee of the House of Representatives; the Veterans Affairs Subcommittee of the Labor and Public Welfare Committee of the Senate, and the Ways and Means Committee of the House of Representatives.

19. Defendants may, in their discretion as provided in 10 U.S.C. 672 and 674, order members of the Reserves, including members of Congress who are members of the Reserves, into active duty without their consent

(a) for the duration of any war or national emergency declared by Congress;

(b) at any time, for members of the Reserve in active status, for no more than 15 days a year.

20. Defendants may at any time, in their discretion as provided in 10 U.S.C. 681, release members of the Reserves, including members of Congress who are members of the Reserves, from active duty.

21. All commissioned officers in the Reserves below flag or general officer rank are appointed by the President alone; all commissioned officers in the Reserves of flag or general officer rank are appointed by the President with the advice and consent of the Senate; commissioned officers in the Reserves of all ranks serve during the pleasure of the President and may be discharged by him alone; all as provided in 10 U.S.C. 593.

22. Senators and members of the House of Representatives subscribe to the following oath of office:

I, , do solemnly swear(or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.

23. Members of the National Guard subscribe to an oath to "obey the orders of the President of the United States and of the Governor of the State of [name of state]", as provided in 32 U.S.C. 312.

24. On December 12, 1965, defendant Laird's predecessor as Secretary of Defense issued a directive transferring all members of Congress then in the Ready Reserve to the Standby Reserve; but permitting those with a remaining statutory military obligation, or with more than 18 but less than 20 years of service toward retirement, to continue to participate voluntarily in Reserve training.

25. On May 22, 1969, defendant Laird authorized all persons, including members of Congress, transferred to the Standby Reserve by the directive referred to in paragraph 24, to be assigned, at their request, to the Active status list of the Standby Reserve, to participate in training and to earn training points creditable for promotion and retirement.

First Cause of Action

26. Membership in the Reserves, whether active, inactive or retired, whether as an officer or as an enlisted member, whether paid, unpaid or with the possibility in the future of payment for Reserve duty or for retire-

ment, is an office under the United States within the meaning of Article I, section 6, clause 2 of the United States Constitution, and members of Congress are prohibited by that clause from holding such membership.

27. Such membership in the Reserves is incompatible with membership in Congress and is prohibited by Article I, section 6, clause 2 of the United States Constitution.

28. Such membership in the Reserves subjects a member of Congress who is also such a member of the Reserves to the possibility of influence and/or retaliation by the President, by the defendants or by other members of the executive branch, in violation of the independence of the Congress established by Article I of the United States Constitution.

29. Such membership in the Reserves places upon a member of Congress who is also such a member of the Reserves possible inconsistent obligations that may require him to violate his duty faithfully to perform one office or the other.

30. Such membership in the Reserves has induced and/or may induce members of Congress who are also such members of the Reserves to vote and to influence other members of Congress to vote more favorably than otherwise to the wishes of defendants, other members of the military establishment, including members of the Regular armed forces, and/or military or defense contractors, on measures affecting the military establishment and appropriations therefor, military or defense contracts, active and retired military pay, measures affecting the Reserves and members thereof, and measures affecting war, peace and military action by the United States.

31. Membership in the National Guard requires subscription to an oath to obey the orders of the President

and of the Governor of a state, which is inconsistent with the oath of members of Congress prescribed in 5 U.S.C. 3331, taken pursuant to 2 U.S.C. 21, 25.

32. Such membership in the Reserves by members of Congress thereby deprives or may deprive the individual named plaintiffs and all other citizens and taxpayers of the United States of the faithful discharge by members of Congress who are members of the Reserves of their duties as members of Congress, to which all citizens and taxpayers are entitled.

SECOND CAUSE OF ACTION

33. Such membership in the Reserves by members of Congress thereby deprives or may deprive the individual named plaintiffs and all other members of the Reserves of rights, privileges and benefits to which they otherwise are or may be entitled; or may subject them to call for active duty, including combat duty placing them in danger of life and limb, to which they otherwise would not be subject.

THIRD CAUSE OF ACTION

34. Defendants have in the past and may in the future treat members of Congress who are members of the Reserves more favorably than other members of the Reserves, including the individual named plaintiffs, in respect of assignments for active duty for training, call to active duty and promotion.

FOURTH CAUSE OF ACTION

35. Members of the Reserves who are also Senators may vote and may influence other Senators to vote in a manner more favorable than otherwise on the nomination of members of the Senate to be flag or general officers, to the prejudice of other members of the Reserves who

may be candidates for such rank, including the individual named plaintiffs.

FIFTH CAUSE OF ACTION

36. Membership in the Reserves of members of Congress effectively abridges the rights of plaintiffs Committee, the individual named plaintiffs and other persons opposed to the United States military involvement in Vietnam to petition the government for redress of grievances; in violation of the First Amendment to the United States Constitution.

RELIEF REQUESTED

37. Plaintiffs request that this Court

(a) issue an order in the nature of mandamus directed to defendants requiring them to remove from the rolls, lists, rosters or other documents within defendants' control, designating members of the Reserves and to discharge from the Reserves, all members of Congress who are officers or enlisted members of the Reserves; and requiring them to remove from such rolls, lists, rosters or other documents, and to discharge from the Reserves, any officer or enlisted member of the Reserves who shall thereafter become a member of Congress;

(b) permanently enjoin defendants and their successors from placing on such rolls, lists, rosters or other documents, or otherwise enrolling as an officer or enlisted member of the Reserves any member of Congress during his continuance in office as a member of Congress;

(c) declare that membership in the Reserves is an office under the United States that Article I, section 6, clause 2 of the United States Constitution prohibits members of Congress to hold and is incompatible with membership in the Congress; and

(d) issue an order in the nature of mandamus to defendants requiring them to take all action available under the law to reclaim from members of Congress and former members of Congress who have been members of the Reserves during their continuance in office as members of Congress, all active and/or retired Reserve pay that said members of Congress received during their continuance in office as members of Congress.

WILLIAM A. DOBROVIR
1660 L Street, N.W.
Washington, D.C. 20036
Attorney for Plaintiffs

Jan. 24, 1973

APPENDIX D

MEMBERS OF 93d CONGRESS WHO ARE MEMBERS OF A RESERVE COMPONENT

Name	Service	Rank	State	Pay Status	Comments
		READY RESERVE			
Montgomery, Gillespie V.	Army NG	Col.	Miss.	Pay	
Saxbe, William B.	Army NG	Col.	Ohio	Non-pay	Inactive
		ACTIVE STANDBY			
Carey, Hugh L.	USAR	Col.	N.Y.	Non-pay	
Chappell, Bill, Jr.	USNR	Capt.	Florida	"	
Clark, Frank M.	USAFR	LTC	Penna.	"	
Corman, James C.	USMCR	LTC	Calif.	"	
Derwinski, E.J.	USAR	Maj.	Ill.	"	
Frey, Louis J.	USNR	Cdr.	Florida	"	
Fuqua, John D., III	USAR	Capt.	Florida	"	
Hansen, Orval H.	USAFR	Maj.	Idaho	"	
Hechler, Ken	USAR	Col.	W. Va.	"	
Hogan, Lawrence J.	USNR	Cdr.	Md.	"	
Hosmer, Craig	USNR	RAdm.	Calif.	"	
Mailliard, William S.	USNR	RAdm.	Calif.	"	
Murphy, John M.	USAR	LTC	N.Y.	"	
Pell, Clairborne	USCGR	Capt.	R. I.	"	
Roberts, Ray	USNR	Capt.	Texas	"	Dept. of Trans.
Satterfield, David E., III	USNR	Capt.	Va.	"	
Spence, Floyd D.	USNR	Capt.	S.C.	"	
Stratton, Samuel S.	USNR	Capt.	N.Y.	"	
Tower, John G.	USNR	BM 1	Texas	"	
Wilson, Bob	USMCR	LTC	Calif.	"	
Wylie, Chalmers P.	USAR	LTC	Ohio	"	
		INACTIVE STANDBY			
Beard, Robin L., Jr.	USMCR	Capt.	Tenn.	Non-pay	
Brasco, Frank J.	USAR	Capt.	N.Y.	"	
Chamberlain, Charles E.	USCGR	Capt.	Mich.	"	Dept. of Trans.
Dominick, Peter H.	USAFR	Col.	Colo.	"	
Hammerschmidt, John P.	USAFR	Maj.	Ark.	"	
Ichord, Richard H.	USAFR	Maj.	Missouri	"	
Inouye, Daniel K.	USAR	Maj.	Hawaii	"	
Myers, John T.	USAR	Maj.	Ind.	"	
Reid, Ogden R.	USAR	Capt.	N.Y.	"	
Smith, Neal E.	USAFR	Maj.	Iowa	"	
Talcott, Burt L.	USAFR	Maj.	Calif.	"	
Ullman, Al	USNR	Capt.	Oregon	"	

Name	Service	Rank	State	Pay Status	Comments
		RETIRED			
Beall, J. Glenn, Jr.	USNR	LtJG	Md.	Without pay	
Bevill, Tom D. F.	USAR	LTC	Ala.	" "	
Blackburn, Ben B.	USNR	LCdr.	Georgia	" "	
Blatnik, John A.	USAFR	Maj.	Minn.	" "	
Bolling, Richard W.	USAR	LTC	Missouri	" "	
Brock, W. E.	USNR	Lt	Tenn.	" "	
Brooke, Edward W.	USAR	Capt.	Mass.	" "	
Brooks, Jack B.	USMCR	Col.	Texas	" "	
Burleson, Omar	USNR	LCdr.	Texas	" "	
Church, Frank	USAR	Maj.	Idaho	" "	
Conable, Barber B., Jr.	USMCR	Col.	N.Y.	" "	
Davis, Glenn R.	USNR	Lt.	Wisconsin	" "	
Dickinson, W. L.	USAFR	Maj.	Ala.	" "	
Donohue, Harold D.	USNR	LCdr.	Mass.	" "	
Evins, Joe L.	USAR	Maj.	Tenn.	" "	
Fisher, O. Clark	USAFR	LTC	Texas	" "	
Flynt, John J., Jr.	USAR	Col.	Georgia	" "	
Fountain, Lawrence H.	USAR	LTC	N.C.	" "	
Frelinghuysen, Peter, H.B.	USNR	Lt.	N.J.	" "	
Fulton, Richard H.	USNR	Capt.	Tenn.	" "	
Gettys, Tom S.	USNR	LCdr.	S.C.	" "	
Gibbons, Sam M.	USAR	Maj.	Florida	" "	
Hart, Philip A., Jr.	USAR	Col.	Mich.	" "	
Hartke, Vance	USNR	Lt.	Ind.	" "	
Horton, Frank J.	USAR	LTC	N.Y.	" "	
Hunt, John E.	USAR	LTC	N.J.	" "	
Javits, Jacob K.	USAR	Col.	N.Y.	" "	
Jones, Robert E.	USNR	LtJG	Ala.	" "	
Long, Russell B.	USNR	Lt.	Louisiana	" "	
McCloskey, Paul N., Jr.	USMCR	Col	Calif.	" "	
McIntyre, Thomas J., Jr.	USAR	Maj	N.H.	" "	
MacDonald, Torbert N.	USNR	Lt	Mass.	" "	
Magnuson, Warren G.	USNR	LCdr	Wash.	" "	
Mann, James R.	USAR	Col	S.C.	" "	
Mathias, Charles McC., Jr.	USNR	Capt.	Md.	" "	
Matsunaga, Spark M.	USAR	LTC	Hawaii	" "	
Moorhead, Carlos, J.	USAR	LTC	Calif.	" "	
Pearson, James B.	USNR	LCdr.	Kansas	" "	
Reuss, Henry S.	USAR	LTC	Wisconsin	" "	
Rhodes, John J.	USAR	Col.	Ariz.	" "	
Robinson, James K.	USAR	Maj.	Va.	" "	
Roush, J. Edward	USAR	Maj.	Ind.	" "	
Saylor, John P.	USNR	Capt.	Penna.	" "	
Sebelius, Keith G.	USAR	Maj.	Kansas	" "	
Sikes, Robert F.	USAR	MG	Florida	" "	
St. Germain, Fernand J.	USAFR	Capt.	R.I.	" "	
Stafford, Robert T.	USNR	Capt.	Vermont	" "	
Stephens, Robert G., Jr.	USAR	LTC	Georgia	" "	
Waggoner, Joe D., Jr.	USNR	LCdr.	Louisiana	" "	
Walsh, William F.	USAFR	Capt.	N.Y.	" "	
Williams, Harrison A.Jr.	USNR	LtJG	N.J.	" "	
Wright, James C., Jr.	USAFR	LTC	Texas	" "	
Young, John	USNR	LCdr	Texas	" "	
Zablocki, Clement C., Jr.	USAFR	LTC	Wisconsin	" "	
Zion, Roger M.	USNR	Lt	Ind.	" "	

Name	Service	Rank	State	Pay Status	Comments
		RETIRED			
Albert, Carl B.	USAR	Col.	Okla.	With pay	
Bennett, Charles E.	USAR	Capt.	Florida	" "	
Bray, William G.	USAR	Col	Ind.	" "	
Cannon, Howard N.	USAFR	MG	Nev.	" "	
Dole, Robert J.	USAR	Capt.	Kansas	" "	
Fong, Hiram	USAFR	Col	Hawaii	" "	
Goldwater, Barry M.	USAFR	MG	Ariz.	" "	
Gurney, Edward J.	USAR	LTC	Florida	" "	
Moss, Frank E.	USAFR	Col	Utah	" "	
Nichols, William F.	USAR	Capt.	Ala.	" "	
Scott, Hugh	USNR	Capt.	Penna.	" "	
Sparkman, John J.	USAR	Col.	Ala.	" "	
Teague, Olin E.	USAR	Col.	Texas	" "	
Thurmond, James S.	USAR	MG	S.C.	" "	
Vigorito, Joseph P.	USAR	1st Lt.	Penna.	" "	
Wyman, Louis C.	USNR	Lt.	N.H.	" "	

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1183

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

BRIEF OF AMICUS CURIAE

THOMAS H. KEES
805 Fifteenth Street, N. W.
Washington, D. C. 20005
Attorney for Reserve Officers Association

INDEX

	Page
Interest of Amicus Curiae	1
Appellee's Position	2
Statement	3
Congressional Action	5
Conclusion	6
Appendix A	7
Appendix B	8

CITATIONS

Constitution, Statutes and Regulations:	
United States Constitution	
Article 1, Section 5	6
Article 1, Section 6	3
Article 1, Section 8	3
5 USC 2105(d)	5, 6
10 USC 372	5, 6
National Defense Act of 1916, 10 USC 351, Section 37	4-5
36 USCA 221	1
36 USCA 223	1, 2
36 USCA 224	2
Miscellaneous:	
1 Hinds, Precedents of the House of Representatives (1907)	6
6 Cannon, Precedents of the House of Representatives (1936)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1188

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Reserve Officers Association, a federally chartered corporation (64 Stat. 313, 36 USCA 221 (1950)) is committed by the terms of its charter to the support of a military policy for the United States that will provide adequate national security, and to promote the development and execution thereof (64 Stat. 313,

USCA 223 (1950)). The Association, in 36 USCA 224, is vested with the right to sue and be sued. The Association's aim is to keep America strong in a perilous world. As such, any attack which would lessen ROA's ability to serve the nation is a matter to be contested. Both your Petitioner and Appellee have consented to the filing of this Brief, Amicus Curiae (See Appendices).

The Association has reviewed your petitioner's brief for certiorari and enthusiastically supports the views expressed therein. Since your petitioner has so ably set forth the extant law on the question there appears to be no need for repetition.

Rather, since the issue presented to this Court is whether there is a constitutional question meriting review by the highest tribunal in the land, we would direct our comments to another aspect for the Court's consideration.

APPELLEE'S POSITION

Appellee in his Brief accompanying his complaint to the District Court for the District of Columbia, says there is not a constitutional question involved, citing as reasons a possible conflict of interest situation, and asserting a conviction that our Constitution as put together by the Framers thereof, laid down rules which create possible inconsistent obligations on the part of a member of Congress if he holds a Reserve Commission. In addition, the Appellee infers there can be no doubt that the Framers did not intend to place members of the legislative branch of the government in a position to determine whether or not such a conflict exists, without any outside interference.

STATEMENT

While it is quite true the Framers' end product (U.S. Const., Art. I, § 6) would seem to indicate some thought along the lines set out in the preceding paragraph, the fact is there was considerable discussion on this point which resulted in a compromise Article which, in its first section, refers to a "civil" office and in its second section to "any" office. Assuming they meant to bar a legislator from holding any "office" in another branch of the government, they could only have arrived at such a position based on what was extant at the time (as regards "military" offices).

The Constitution as finally arrived at in 1787 provided in Article 1, Section 8 for the organization of a militia, and reserved to the States the appointment of officers. The second Amendment to the Constitution provided that the right to bear arms by the people who were to constitute the to-be organized militia would not be infringed. It follows that the Framers were thinking in terms of various State militias in contrast with today's federal reserve forces. The Congress was given the power to raise and support armies but the reserves were to be composed of militiamen drawn from the various State populations for the purpose of suppressing insurrections and repelling invasions (U.S. Const., Art. 1, § 8). The President was designated as Commander in Chief of the Army and Navy of the United States but no provision was made for the establishment of a Federal Army and Navy Reserve. It is clear that, so far as the Framers were concerned, such a Reserve would be composed of the militia of the several states. As pointed out by the lower court, the Framers were concerned about the availability of members of the legislative body for military service on the

grounds that experienced soldiers (officers) could very well be the best men in the event of insurrection or invasion and therefore ought not, simply because they were members of the Congress, be foreclosed from military service. These fears were not so much for the individual as they were for the good of the new country.

Because of these objections the originally proposed clause quoted by the Court below as follows:

> "The members of each House shall be ineligible to and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards"

was changed in a compromise move, to read:

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office".

Since the compromise wording was apparently satisfactory to the majority of the Framers including those who had raised the objections to the proposed language, the acceptable wording became part of our Constitution.

We believe it fair to say that the militia as it existed or was about to exist in 1787 is not comparable in any fashion to today's Reserve forces. The Officers' Reserve Corps did not come into being until 1916 (National Defense Act, June 3, 1916, § 37, 39 Stat. 776, 10

USC 351 (1916). Thus we see that the Federal Reserve Forces are creatures of Congress, and are neither provided for nor contemplated by the Constitution.

CONGRESSIONAL ACTION

The Congress of the United States, in its legislative capacity, further declared specifically, in the National Defense Act (National Defense Act, June 3, 1916, Section 37, 39 Stat. 776, 10 USC 372 (1916), that

> "Members of the Officers' Reserve Corps, while not on active duty, shall not, by reason solely of their appointments, oath, commissions, or status as such, or any duties or function performed or pay and allowances received as such, be held or deemed to be officers or employees of the United States or persons holding any office of trust or profit or discharging any official function under or in connection with any department of the Government of the United States."

Appellee's attack is really aimed at this provision, terming it unconstitutional based on the inferred intent of the Framers of our Constitution.

In addition, the Court's attention is drawn to 80 Stat. 409, 5 USC 2105(d) (1966). Once again, Congress has by definition, held that reservists are not office holders. The section is quoted as follows:

> "(d) A reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity."

Thus we see that the Congress, presumably within the framework of the whole law including the Constitu-

tion, has very carefully eliminated an inactive officer reservist as an "office holder" and has thereby, since both statutes (5 USC 2105(d); 10 USC 372) are for a specific purpose or situation, indicated an unwillingness to erode the expressed intent of the Constitution.

It seems anomalous to state that Congress has by itself created an instrument that will diminish its own power, and that this situation can only be corrected by the courts. To hold thus would be indeed an attack upon the maturity and good intentions of the Congress. In this particular situation, Congress, if an evil exists (and the Congress would be the first to feel this evil), can undo what they have done, by appropriate legislation. In addition, the Constitutional power to pass on the qualifications of their own members can be invoked (U. S. Const., Art., § 5; cf. 1 Hinds, *Precedents of the House of Representatives,* 592-603, 612, 620-632 (1907); 6 Cannon, *Precedents of the House of Representatives,* 67, 69 (1936).

CONCLUSION

The Supreme Court should grant certiorari, should reverse the holdings below, and declare that the matter is properly one for Congressional action, if action is indicated. The Constitutional powers of Congress to legislate, and to pass on the qualifications of its own members should be the only controlling factors in this case.

Respectfully submitted,

THOMAS H. KING
805 Fifteenth Street, N. W.
Washington, D. C. 20005
Attorney for Reserve Officers Association

APPENDIX A

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

February 14, 1973

Thomas H. King, Esq.
King, Biddle and Shapiro
805 Fifteenth Street, N.W.
Washington, D. C. 20005

Re: Laird, et al. v. Reservists Committee
to Stop the War, et al.

Dear Mr. King,

In response to the request in your letter of February 12, I hereby consent to your filing a brief amicus curiae in the above-captioned case, on behalf of the Reserve Officers Association.

Very truly yours,

/s/ ERWIN N. GRISWOLD
Erwin N. Griswold
Solicitor General

APPENDIX B

WILLIAM A. DOBROVIR
2005 L STREET, N.W.
WASHINGTON, D. C. 20036
(202) 293-1544

March 8, 1973

Thomas King, Esq.
Southern Building
15th and H Streets, N.W.
Washington, D. C. 20005

Dear Mr. King:

Respondents in *Richardson* v. *Reservists Committee to Stop the War*, U.S. Supreme Court, October Term 1972, No. 72-1188, consent to the Reserve Officers Association filing a brief amicus curiae therein.

Very truly yours,

/s/ WILLIAM A. DOBROVIR
William A. Dobrovir

WAD:nye

TABLE OF CITATIONS

CASES:

Association of Data Processing Organizations v. Camp, 397 U.S. 150 2

Baker v. Carr, 369 U.S. 186 3

Barlow v. Collins, 397 U.S. 159 2

Flast v. Cohen, 392 U.S. 83 .....1, 2, 3

Lamm v. Volpe, 449 F.2d 1202 (10th Cir. 1971) 4

Linda R. S. v. Richard D. and Texas, — U.S. — (March 5, 1972, No. 71-6078) 3

Pietsch v. President of the United States, 434 F.2d 861 (2d Cir. 1970), *cert. denied* 403 U.S. 920) .. 4

Sierra Club v. Morton, 405 U.S. 727 ..... 2, 3

Troutman v. Shriver, 417 F.2d 171 (5th Cir. 1969), *cert. denied* 397 U.S. 923 4

Velvel v. Nixon, 415 F.2d 235 (10th Cir. 1969), *cert. denied* 396 U.S. 1042 4

CONSTITUTIONAL PROVISION:

Art. I, § 6, cl. 2, the Incompatibility Clause 2
Art. III 2

LAW REVIEW NOTES:

Note, 85 HARV. L. REV. 507 (1971) 3, 5, 6
Note, 40 UNIV. CINCINNATI L. REV. 621 (1971) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1188

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ARGUMENT

The decision of the District Court, affirmed *per curiam* by a unanimous Court of Appeals, is clearly correct. The decision below does not warrant review by this Court.

1. *Standing.* The decision below was a careful and conscientious application of the principles governing standing to sue announced by this Court in *Flast* v.

Cohen, 392 U.S. 83, as reaffirmed in *Sierra Club* v. *Morton,* 405 U.S. 727. As the District Court recognized, the doctrine of standing is rooted in Article III of the Constitution and is an expression of the requirement that there be an actual case or controversy. App. A (to the Petition for Certiorari), 27-28. The District Court applied to the case before it the *Flast* requirements that "the dispute sought be adjudicated will be presented in an adversary context" and that the complainants have "a personal stake in the outcome of the controversy," *ibid.; Sierra Club* v. *Morton,* 405 U.S. 727, 732. The issue in the case, like in *Flast* v. *Cohen,* was the violation of a specific provision of the Constitution. The case did not present the question of a violation of a statute, and in this respect differs from *Sierra Club* v. *Morton, Association of Data Processing Service Organization* v. *Camp,* 397 U.S. 150, and *Barlow* v. *Collins,* 397 U.S. 159. The requisite "personal stake" therefore had to be defined in the constitutional terms stated in *Flast,* 392 U.S. at 102—in the "logical nexus between the status asserted" by the plaintiffs, as citizens, "and the claim sought to be adjudicated." App. A, 30-31. In other words, there had to be a relationship between the plaintiffs' status and the constitutional provision invoked.

The District Court found the requisite nexus in the relationship between plaintiffs' status as citizens of the United States and the Incompatibility clause of the Constitution, Art. I, § 6, cl. 2, whose thrust is to preserve the separation of powers principle of our constitutional plan. It found injury to plaintiffs—and all other citizens—in "the potential for undue influence" created by violation of the clause, "a precise self-operative provision of the Constitution," which

presented a "narrow" issue, not "a generalized grievance about the conduct of government." App. A, 30-31. And the District Court found that there was no other status besides that of citizens that would confer standing; that "if these plaintiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can." App. A, 31. The decision below thus carefully applied this Court's " 'rule of self-restraint' designed to avoid passing on premature or ill-focused constitutional claims." App. A, 28. See *Note,* 85 HARV. L. REV. 507, 510-512 (1971).

The decision not only correctly applied the principles of *Baker* v. *Carr,* 369 U.S. 186, and *Flast* v. *Cohen,* but remains consistent with later decisions of this Court. The injury to plaintiffs is shared equally by all citizens, but is it not thereby "less deserving of legal protection through the judicial process," and plaintiffs are themselves "among the injured," *Sierra Club* v. *Morton,* 405 U.S. at 735. Recognition of plaintiffs' standing was necessary if the Incompatibility clause was not to go unenforced, App. A, 31, a result that, contrary to this Court's view, would "insulate" unconstitutional "executive action from judicial review," *Sierra Club* v. *Morton,* 405 U.S. at 740; *cf. Linda R. S.* v. *Richard D. and Texas,* —— U.S. ——, slip Opinion at 6, n. 5. (March 5, 1972, No. 71-6078).[1]

---

[1] The importance of this factor is emphasized by the extreme position petitioners have heretofore taken. While petitioners concede that the Incompatibility clause would bar a legislator from "hold[ing] a commission in the Regular Army," Petition at 14, they would deny any litigant standing to contest the violation in court. At oral argument in the Court of Appeals petitioners declared that the courts were powerless to act even if the Chairman of the Joint Chiefs of Staff were to win election to and take his seat in the Senate while refusing to relinquish his military office.

The decision below is likely to be applicable in no more than a handful of cases. Precise prohibitions of this sort, where no litigant with a status other than that as a citizen would be likely to invoke the clause, are few. There is little likelihood that it will "spawn a significant number of suits by citizens," Petition at 7. This case is probably *sui generis*.

The decision below, thus carefully limited to a narrow class of cases, is not in conflict with decisions in other circuits. Petition at 9. In the four opinions petitioners cite as in conflict there was, unlike in this case, no "violation of specific constitutional limitations," *Troutman* v. *Shriver*, 417 F.2d 171, 174 (5th Cir. 1969) *cert. denied* 397 U.S. 923, for the constitutional provisions invoked were broad grants of authority to the Congress (like the war making power in *Velvel* v. *Nixon*, 415 F.2d 235 (10th Cir. 1969), *cert. denied* 396 U.S. 1042 and *Pietsch* v. *President of the United States*, 434 F.2d 861 (2d Cir. 1970), *cert. denied* 403 U.S. 920) or to the States (like the 10th amendment in *Lamm* v. *Volpe*, 449 F.2d 1202 (10th Cir. 1971)). Also, unlike this case, there were other potential litigants who had standing to challenge the action complained of in *Lamm* (Congress had expressly created a remedy for states against any withholding of highway funds for, *inter alia*, failure to get rid of billboards—which Lamm asserted interfered with the States' police power) and to present the issue of the unconstitutionality of the draft alleged in *Pietsch*, (*e.g.*, draftees) the only issue as to which the court dealt with Pietsch's standing as a "citizen-at-large," 434 F.2d at 863.[2]

---

[2] But *cf. Velvel*, 415 F.2d at 238 n. 1, citing cases that all antedate *Flast*.

2. *Justiciability.* The District Court was correct in finding that the issue raised was justiciable. The petitioners had urged below, as they do here, that the case involves the qualifications of a member of Congress to be seated, which only the Congress itself may judge. Petition at 10-12. The District Court correctly pointed out that the issue is not whether Congressmen should be seated, but rather whether the petitioners—Cabinet Secretaries—may continue to maintain seated Congressmen in their previously held office as Reserve officers. While Congress may have sole authority "to judge whether its members are disqualified from being seated by virtue of their holding an office," Petition at 12 n. 9, it is the courts, not Congress, which have the duty to determine whether a Cabinet Secretary's action is in violation of the Constitution and the power to provide a remedy for such violation. See *Note,* 85 HARV. L. REV. *supra* at 508-510; *Note,* 40 UNIV. CINCINNATI L. REV. 621, 624-25 (1971).

3. *The Merits.* The District Court was likewise clearly correct in holding that the Incompatibility clause bars members of Congress from continuing to serve in the Armed Forces reserves. The District Court analyzed the constitutional debates with great care and concluded that "the clause was designed to ensure the integrity of a particular form of government, by preventing encroachments upon the separation of powers . . . ." App. A, 22. The District Court then turned to the specific question whether a reserve commission was an "office" within the meaning of the clause. *Id.* at 24. The District Court recognized the "limited nature" of a Reservist's "relationship [with] the Executive branch" but found this of little weight against "the purpose of the Framers, who erected an

inflexible barrier against Congressmen holding or being appointed to any other office under the United States," and "the enormous involvement of Congress in matters affecting the military." *Id.* at 26; see *id.* at 27.[3]

In short, a Reservist, however limited his activities, is by virtue of his Reserve membership alone subject to the constitutional prohibition because he is, by however so little, subject to influence the Incompatibility clause was intended to eradicate absolutely. "[N]o line can be drawn between the large and small office." App. A., 27. See *Note,* 85 HARV. L. REV. *supra* at 513.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

WILLIAM A. DOBROVIR
2005 L Street, N.W.
Washington, D.C. 20036
Attorney for Respondents

---

[3] Petitioners, quoting a law review note, make factual assertions about the characteristics of a Reserve commission. Petition at 11. It should be noted that the record is silent on this matter because the District Court permitted no discovery and resolved the issue as a matter of law. Contrariwise, the record does contain a plethora of evidence from published Congressional debates, hearings and reports and from the Reserve Officers Association's magazine showing the influence of Congressmen-reservists' reserve connections upon their legislative activities. This material was reproduced as Appendix I and II to respondents' brief in the Court of Appeals.

INDEX

	Page
Interest of Amicus Curiae	1
Respondent's Position	2
Statement	2
Congressional Action	2
Jurisdiction and Standing	5
Conclusion	7

CITATIONS

Constitution, Statutes and Regulations:

United States Constitution

Article 1, Section 5	7
Article 1, Section 6	2, 6, 7
Article 1, Section 8	3

Statutes:

5 USC 2105(d)	5
10 USC 351	4
10 USC 372	4
28 USC 2282	5
36 USC 221	1
36 USC 223	1
36 USC 224	1

Miscellaneous:

1 Hinds, Precedents of the House of Representatives (1907)	7
6 Cannon, Precedents of the House of Representatives (1936)	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1188

ELLIOT L. RICHARDSON, SECRETARY OF DEFENSE, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

BRIEF OF THE RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES AS AMICUS CURIAE ON THE MERITS

INTEREST OF AMICUS CURIAE

The Reserve Officers Association of the United States, a federally chartered corporation (64 Stat. 313, 36 USC 221 (1950)) is committed by the terms of its charter to the support of a military policy for the United States which will provide adequate national security, and to promote the development and execution thereof (64 Stat. 313, 36 USC 223 (1950)). The Association (which has over 70,000 members) is vested with the right to sue and be sued (36 USC 224). The Association's aim is to keep America strong in a perilous world. As such, any attack which would lessen ROA's ability to serve the nation is a matter to be contested. Both your Petitioner and Respondent have consented to the filing of this Brief, Amicus Curiae.

RESPONDENT'S POSITION

Respondent, in his Brief accompanying his complaint to the District Court for the District of Columbia, cites a possible conflict of interest situation, and asserts a conviction that our Constitution as put together by the Framers thereof, laid down rules which create possible inconsistent obligations on the part of a member of Congress if he holds a Reserve Commission. In addition, the Respondent infers the Framers did not intend to place members of the legislative branch of the government in a position to determine (exclusively and without court intervention) whether or not such a conflict exists.

STATEMENT

While it is quite true the Framers' end product (U.S. Const., Art. I § 6) would seem to indicate some thought along the lines set out in the preceding paragraph, the fact is there was considerable discussion on this point which resulted in a compromise Article which, in its first section, refers to a "civil" office and in its second section to "any" office. Assuming they meant to bar a legislator from holding any "office" in another branch of the government, they could only have arrived at such a position based on what was extant at the time (as regards "military" offices).

The Constitution as finally arrived at in 1787 provided in Article I, Section 8 for the organization of a militia, and reserved to the States the appointment of officers. The second Amendment to the Constitution provided that the right to bear arms by the people who were to constitute the to-be organized militia would not be infringed. It follows that the Framers were thinking in terms of various State militia in contrast with today's federal reserve forces. The Congress was

given the power to raise and support armies but the reserves were to be composed of militiamen drawn from the various State populations for the purpose of suppressing insurrections and repelling invasions (U.S. Const., Art. I, § 8). The President was designated as Commander in Chief of the Army and Navy of the United States but no provision was made for the establishment of a Federal Army and Naval Reserve. It is clear that, so far as the Framers were concerned, any such reserve if contemplated at all as such, would be composed of the militia of the several states. As pointed out by the lower court, the Framers were concerned about the availability of members of the legislative body for military service on the grounds that experienced soldiers, (officers), which many of them were or had been, could very well be the best men in the event of insurrection or invasion and therefore ought not, simply because they were members of the Congress, be foreclosed from military service. (This included a great number of those concerned, who had served in the Revolutionary War). These concerns were not so much for the individual as they were for the good of the new country.

Because of these objections the originally proposed clause quoted by the Court below as follows:

> "The members of each House shall be ineligible to and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected; and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards"

was changed in a compromise move, to read:

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any

> civil office under the authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United States shall be a member of either House during his continuance in office."

Since the compromise wording was apparently satisfactory to the majority of the Framers including some of those who had raised the objections to the proposed language, the acceptable wording became part of our Constitution.

We believe it fair to say that the militia as it existed or was about to exist in 1787 is not comparable in any fashion to today's reserve forces. The Officers' Reserve Corps did not come into being until 1916 (National Defense Act, June 3, 1916, § 37, 39 Stat. 776, 10 USC 351 (1916)). Thus we see that the Federal Reserve Forces are creatures of Congress, and are neither provided for nor contemplated by the Constitution.

CONGRESSIONAL ACTION

The Congress of the United States, in its legislative capacity, declared specifically, in the National Defense Act (National Defense Act of June 4, 1920, as amended by the act of July 11, 1930, 46 Stat. 154, (old) 10 USC 372; c.f. Sec. 1361 (p. 857), Military Laws of United States (Army) Ann. 1949, 9th ed.)), that

> "Members of the Officers' Reserve Corps, while not on active duty, shall not, by reason solely of their appointments, oath, commissions, or status as such, or any duties or function performed or pay and allowances received as such, be held or deemed to be officers or employees of the United States or persons holding any office of trust or profit or discharging any official function under

or in connection with any department of the Government of the United States."

In addition, the Court's attention is drawn to 80 Stat. 409, 5 USC 2105(d) (1966). Once again, Congress has by definition, held that reservists are not office holders. The section is quoted as follows:

> "(d) A reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity."

Thus we see that the Congress, presumably within the framework of the whole law including the Constitution, has very carefully eliminated a nonactive duty officer reservist from being considered an "office holder".

JURISDICTION AND STANDING

The District Court, in its order, granting (in part) Respondent's motion for summary judgment, has, in effect, determined that the portion of the National Defense Act as amneded by the act of July 11, 1930, quoted above), is unconstitutional. Although no injunctive relief was granted, the complaint asked for such relief. Since the complaint in effect asked that an injuntion be issued restraining the operation of a statute as being repugnant to the Constitution, the application therefore should have been heard by a three judge court under the provisions of title 28, section 2282, U.S. Code.[1]

---

[1] "§ 2282. An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress

In its final comment on "Standing", the District Court stated: "It is not irrelevant to note that if these plaintiffs cannot obtain judicial review of defendant's action, then, as a practical matter, no one can."[2] It is submitted that no one can. Article I, Section 6 of the Constitution provides that no federal "office" holder may be a member of Congress. Article I, Section 5 reserves to the Congress the power to pass upon the qualifications of its members. By giving equal weight to both sections, we arrive at the conclusion that the Congress *must* consider the holding of another Federal office as one of the disqualifications for membership.

As shown above, Congress has already determined that reserve officers as a class, do not hold a federal "office", while not on extended active duty. This is in accord with the Constitutional mandate to Congress to pass upon qualifications of its members.

It seems anomalous to intimate that Congress has passed legislation which will diminish its own power, and that this situation can only be corrected by the courts. To hold thus would be indeed an attack upon the maturity and good intentions of the Congress, not to mention the integrity of the members of one of our branches of government. In this particular situation, Congress, if an evil exists (and the Congress would be the first to feel this evil), can undo what they have

---

for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 6 2Stat. 968."

[2] U.S. Dist. Ct., D.C. Circuit, Civil Action No. 1429-70.

created, by appropriate legislation. In addition, the Constitutional power of the Congress to pass on the qualifications of their own members can be invoked (U.S. Const., Art. I, § 5; c.f. 1 Hinds, Precedents of the House of Representatives, 592-603, 612, 620-632 (1907); 6 Cannon, Precedents of the House of Representatives, 67, 69 (1936)).

CONCLUSION

The Supreme Court should reverse the holdings below, and declare that the matter is properly one for Congressional action, if action is indicated. The Constitutional powers of Congress to legislate, and to pass on the qualifications of its own members should be the only controlling factors in this case. In the event this honorable Court should decide that the matter in controversy is properly for the Court's determination, then the decision should be that the holding of a reserve commission, while not on extended active duty, is not the holding of an "office" under Article I, Section 6 of the United States Constitution.

Respectfully submitted,

THOMAS H. KING
805 15th Street, N.W.
Washington, D.C. 20005
Attorney for Reserve Officers Association of the United States

Of Counsel:

MAURICE F. BIDDLE
HAROLD SHAPIRO

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions involved	2
Statement	3
Summary of argument	7
Argument:	
I. Respondents have no standing to maintain this action	10
II. The complaint does not present a justiciable issue	29
A. A non-justiciable political question is presented if the issue sought to be litigated is committed to a co-ordinate political department of the government	29
B. The determination whether membership in the Armed Forces Reserves bars a person from serving as a member of Congress because it constitutes the holding of an office under the United States is within the exclusive authority of Congress	31
1. The text and structure of the constitutional provision show that the prohibition is a qualification for membership in Congress	31

317-464—72——1

Argument—Continued

II. The complaint, etc.—Continued
B. The determination—Continued
2. The history of Article I, Section 6, Clause 2 shows that it provides a qualification for membership in Congress 33
3. Congress consistently has treated the prohibition in Article I, Section 6, Clause 2, against holding an office under the United States as a qualification for membership 36
III. A commission in the Armed Forces Reserve is not an office under the United States under Article I, Section 6, Clause 2 43
A. The holding of reserve commissions by members of Congress does not involve the evil at which the clause is directed 44
1. The clause was intended to prohibit members of Congress from receiving or holding other federal offices that could lead to domination and corruption of the legislative branch by the executive branch 44
2. The holding of reserve commissions by members of Congress poses no danger of improper influence upon Congress by the executive branch 48

Argument—Continued
III. A commission, etc.—Continued
B. The conclusion that a reserve commission is not an office under the United States is supported by the fact that holders of reserve commissions are not officers of the United States 52
C. Congress has recognized that a reservist does not hold an office under the United States 54
Conclusion 60

CITATIONS

Cases:

Baker v. *Carr*, 369 U.S. 186 ..... 9, 23, 24, 29, 30, 31
Brown v. *Board of Education*, 347 U.S. 483 19
DaCosta v. *Laird*, 471 F. 2d 1146 15
Flast v. *Cohen*, 392 U.S. 83 ..... 7, 13, 23
Frothingham v. *Mellon*, 262 U.S. 447 ..... 13, 21
James, Application of, 241 F. Supp. 858 31
Kentucky v. *Dennison*, 24 How. 6 19
Laird v. *Tatum*, 408 U.S. 1 17
Lamm v. *Volpe*, 449 F. 2d 1202, certiorari denied, 405 U.S. 1075 15
Levitt, Ex Parte, 302 U.S. 633 ..... 7, 16, 17
Linda, R. S. v. *Richard D.*, No. 71-6078, decided March 5, 1973 11
Mississippi v. *Johnson*, 4 Wall. 475 19
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 18
Mottola v. *Nixon*, 464 F. 2d 178 15
Myers v. *United States*, 272 U.S. 52 41
Pacific Telephone Co. v. *Oregon*, 223 U.S. 118 19
Pietsch v. *President of the United States*, 434 F. 2d 861, certiorari denied, 403 U.S. 920 15
Powell v. *McCormack*, 395 U.S. 486 ..... 9, 29, 30, 32, 37
Roudebush v. *Hartke*, 405 U.S. 15 ..... 31, 32

Cases—Continued

Sharrow v. *Brown*, 447 F. 2d 94, certiorari denied, 405 U.S. 968 15
Sierra Club v. *Morton*, 405 U.S. 727 ..... 7, 11, 14, 16, 26, 28
Simmons v. *United States*, 55 Ct. Cl. 56 53
Taussig v. *McNamara*, 219 F. Supp. 757, affirmed *per curiam*, April 6, 1964, certiorari denied, 397 U.S. 834 54
Troutman v. *Shriver*, 417 F. 2d 171, certiorari denied, 397 U.S. 923 15
United States v. *Germaine*, 99 U.S. 508 53
United States v. *Hartwell*, 6 Wall. 385 ..... 9, 43, 52, 53
United States v. *Maurice*, Fed. Case No. 15,747 52
United States v. *SCRAP*, No. 72-535, decided June 18, 1973 ..... 7, 13, 14, 16
Velvel v. *Nixon*, 415 F. 2d 236, certiorari denied, 396 U.S. 1042 15

Constitution, statutes and regulations:

United States Constitution:
Article I, Section 2 ..... 31, 32
Article I, Section 3 ..... 31, 32
Article I, Section 5 ..... 17, 32, 36
Article I, Section 5, Clause 1 ..... 2, 5, 8, 29, 30, 36, 41, 42
Article I, Section 6, Clause 2 ..... passim
Article I, Section 8 22
Article I, Section 9, Clause 8 25
Article III 8, 10, 25, 27
Article III, Section 2 3
First Amendment 18, 22
Fourteenth Amendment 19
Seventeenth Amendment 32
Administrative Procedure Act, Section 10, 60 Stat. 243, as amended, 6 U.S.C. 701 11

Constitution statutes and regulations—Continued

	Page
National Defense Act of 1930, Section 37, 39 Stat. 189, as amended, 5 U.S.C. 2105(d)	9, 43, 54
National Defense Act of 1916, 39 Stat. 166, et seq., as amended	16
39 Stat. 206	57
39 Stat. 208–210	57
10 U.S.C. 267(b)	50
10 U.S.C. 269(b)	49
10 U.S.C. 269(g)	49
10 U.S.C. 273(c)	50
10 U.S.C. 593(b)	50
10 U.S.C. 672(a)	50
10 U.S.C. 672(b)	50
10 U.S.C. 802	49, 50
10 U.S.C. 802(3)	49
10 U.S.C. 1161(a)	50
10 U.S.C. 1161(b)	50
10 U.S.C. 1331	50
10 U.S.C. 1334(a)	50
10 U.S.C. 3360(a)	50
10 U.S.C. 3911	50
10 U.S.C. 5891(a)	50
10 U.S.C. 8360(a)	50
10 U.S.C. 8911	50
32 C.F.R. 125.4	48
32 C.F.R. 136.3	49
Miscellaneous:	
17 *Annals of Congress* 871 (1852)	36
6 Cannon, Precedents of the House of Representatives (1936), § 60–65	36, 39, 40, 53, 58
§ 63–65	
45 Comp. Gen. 405	54
48 Comp. Gen. 699	50
39 Cong. Rec. 3849	53

Miscellaneous—Continued

	Page
72 Cong. Rec. 11881	57
109 Cong. Rec. 8715	40
109 Cong. Rec. 8717	40, 42
109 Cong. Rec. 8718	40
109 Cong. Rec. 10000–10002	40
109 Cong. Rec. 10574–10574	40
109 Cong. Rec. 13211–13214	40
Cooley, *Constitutional Limitations*, (7th ed., 1903)	31
2 Curtis, *History of the Constitution of the United States* (1861 ed.)	44–45
Debates and Proceeding in the United States Congress, 18th Cong., 1st Sess.	37
Department of Defense Directives:	
1200.7, Section V, C, 2 (July 2, 1970)	48, 49
1215.6, Section IV, E, 4 (June 12, 1971)	50
1215.6, Section IV, F, 3 (June 12, 1971)	50
1235.9, Section IV, A, 5 (September 13, 1967)	49
1235.9, Section IV, A, 5, (added March 3, 1970)	50
Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 *Journal of Public Law* 103 (1968)	32
Farrand, *The Records of the Federal Convention of 1787* (1937 ed.):	
Volume I	44
Volume II	33, 34, 35, 45
Volume III	35, 47
Federalist, The (Cooke ed., 1961)	
No. 52	35
No. 76	47
Friendly, *Federal Jurisdiction: A General View* (1973)	27

Miscellaneous—Continued

Hill, *The Minute Man in Peace and War: A History of the National Guard* (1964 ed.) ... 58
1 Hinds, *Precedents of the House of Representatives* (1907) ... 36, 37, 38, 39, 40, 58, 59
Hobbs, *Comments on Powell* v. *McCormack*, 17 U.C.L.A. L. Rev. 129 (1969) ... 32
H.R. 5940, 89th Cong. 1st Sess. ... 41
H. Rep. No. 86, 89th Cong. 2d Sess. ... 58
H. Rep. No. 110, 38th Cong., 1st Sess. ... 37
H. Rep. No. 885, 64th Cong., 1st Sess. ... 53
H. Rep. No. 1884, 71st Cong., 2d Sess. ... 55
H. Rep. No. 2205, 55th Cong., 3d Sess. ... 53, 59
H. Res. 41, 89th Cong., 1st Sess. ... 41
H. Res. 352, 88th Cong., 1st Sess. ... 41
H. Res. 353, 88th Cong., 1st Sess. ... 41
H. Res. 369, 88th Cong., 1st Sess. ... 41
H. Res. 377, 88th Cong., 1st Sess. ... 41
Note, *The Power of a House of Congress to Judge the Qualifications of Its Members*, 81 Harvard L. Rev. 673 (1968) ... 32
Note, *The Supreme Court: 1968 Term*, 83 Harvard L. Rev. 62 ... 20
Note, *Standing-Taxpayers Allowed to Challenge Federal Expenditures*, 42 Temple L.Q. 70, (1968) ... 22
Note, *Reservists in Congress*, 50 Tex. L. Rev. 509 ... 50
Note, *Constitutional Law—Separation of Powers*—Article I, Section 6, Clause 2 Renders a Commission in the Armed Forces Reserve Incompatible with Membership in the Congress, 40 Geo. Wash. L. Rev. 542 (1972) ... 32, 35
Note, *Constitutional Law-Establishment Clause-Standing*, 57 Ill. Bar J. 236 (1968) ... 22

Miscellaneous—Continued

Page
Note, *Constitutional Law-Federal Taxpayer's Standing to Challenge Constitutionality of Federal Statutes*, 17 Journal of Public Law 419 (1968) 22
Note, *Constitutional Law-Standing to Sue: What Remains of the Frothingham Rule?*, 48 Neb. L. Rev. 530 (1969) 22
S. Rep. No. 1102, 71st Cong., 2d Sess. 56
1 Story, *Commentaries on the Constitution of the United States* (5th ed., 1891) 47
Warren, *The Making of the Constitution* (2d ed., 1937) 44
Winthrop's *Military Law and Precedents* (2d ed. reprinted, 1920) 58

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1188

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The court of appeals rendered no opinion. The opinion of the district court (Pet. App. B, pp. 17–36) is reported at 323 F. Supp. 833.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1972. On January 26, 1973, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including February 28, 1973, and the petition was filed on that day.

511-424—73——2

The petition was granted on April 23, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether respondents have standing, either as citizens or as federal taxpayers, to challenge the right of congressmen to hold commissions in the Armed Forces Reserves as violating Article I, Section 6, Clause 2 of the Constitution, which prohibits any Senator or Representative from "holding any Office under the United States * * * during his Continuance in Office."

2. Whether the complaint presents a non-justiciable issue because it involves the qualifications of members of Congress of which, under Article I, Section 5, Clause 1 of the Constitution, the Congress is the exclusive judge.

3. Whether membership in the Retired and Standby Reserves constitutes an "Office under the United States" within the meaning of Article I, Section 6, Clause 2 of the Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 5, Clause 1 of the Constitution provides in pertinent part:

> Each House shall be the Judge of the Elections, Returns and Qualifications of its own members * * *.

Article I, Section 6, Clause 2 of the Constitution provides:

> No Senator or Representative shall, during the Time for which he was elected, be appointed

to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Article III, Section 2 of the Constitution provides:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens of different States,—between Citizens or Subjects.

STATEMENT

This class action was commenced in the United States District Court for the District of Columbia by a national association, Reservists Committee to Stop the War, and several named members thereof, seeking a judicial declaration that all members of the United States Congress who hold commissions in the Armed Forces Reserves do so in violation of Article I, Sec-

tion 6, Clause 2 of the United States Constitution.[1] The complaint asks that defendants, the Secretary of Defense and the Secretaries of the Army, Navy and Air Force, be ordered to remove all active congressmen from the Reserve rolls, be enjoined permanently from adding newly-elected congressmen to the Reserve rolls, and be required to reclaim any reservists' pay that members of Congress may have received during their terms in office. Such relief is claimed on the theory that the Reserve status of members of Congress adversely affects plaintiffs, both individually and as a class, by depriving them of "the unbiased consideration by the Congress and its members of measures before the Congress affecting the military establishment and appropriations therefor, including appropriations for compensation and pensions for members of the Reserves, and measures relating to military action, war and peace" (Pet. App. C, p. 42).

No member of Congress was made a party to the suit. The class allegedly being represented consists of all officers and enlisted members of the Reserves who are not members of Congress, all other citizens and taxpayers of the United States, and any person who, although neither a reservist, a citizen, nor a taxpayer, opposed the United States' military involvement in Vietnam (*id.* at 41–42).

---

[1] The complaint, which is set forth at Pet. App. C, pp. 37–43, alleges that the Committee comprises present and former reservists who oppose the United States' involvement in Vietnam. The individual plaintiffs include the Committee's co-chairman, two officers of the Naval Reserve, an enlisted member of the Air Force Reserve, and an enlisted member of the Army Reserve.

Both sides moved for summary judgment in the district court. Defendants argued that (1) plaintiffs lacked standing to challenge the Reserve status of congressmen, (2) the question raised concerned only the "qualifications" of Senators and Representatives and under Article I, Section 5, Clause 1 of the Constitution, was not subject to judicial scrutiny, and (3) membership in the Reserves was not an "Office under the United States" within the meaning of Article I, Section 6, Clause 2 of the Constitution. Following a hearing, the district court granted plaintiffs' motion insofar as it sought a declaratory judgment that members of Congress are "ineligible to hold a commission in the Armed Forces Reserve during [their] continuance in office" (Pet. App. B, p. 36). The plaintiffs' motion was denied, however, with respect to the claims for injunctive relief and for recovery of reservists' pay.[4]

The court held that plaintiffs lacked standing as reservists and as federal taxpayers but had standing as citizens. Observing that "in this Circuit the concept [of standing] has now been almost completely abandoned" (Pet. App. B, p. 27), the court concluded that "the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the consti-

[4] In declining to grant injunctive relief, the court noted that it "must take into account the importance of its action to persons not before the Court, and the fact that any resolution of the matter must necessarily involve coordinate branches of the Government." "In the absence of an urgent necessity," the court stated, it would assume that "Congress and the Executive" will "accommodate themselves voluntarily to the decision * * * having due regard for the special status of Congressmen then seated" (Pet. App. B, pp. 34–35).

tutional provision involved" (*id.* at 31). "[I]f these plaintiffs cannot obtain judicial review of defendants' action," it stated (*ibid.*), "then as a practical matter no one can."

The issue presented, it further held (Pet. App. B, pp. 31–34), was a proper matter for judicial review, notwithstanding that Article I, Section 5, Clause 1 of the Constitution "commits to Congress the decision whether any individual is qualified to sit in Congress" (*id.* at 34). That provision, the court stated (*ibid.*), "does not bar judicial consideration of the question whether executive action must be taken to carry out a constitutional mandate." In its view, since Article I, Section 6, Clause 2 "was intended simply to declare the incompatibility of a seat in Congress and an office in the Executive or the Judiciary" (*id.* at 32), the courts can properly determine whether congressmen must terminate their reserve commissions to satisfy that constitutional requirement.

Finally, on the merits the district court stated that Article I, Section 6, Clause 2 had been added to the Constitution as a result of the Framers' belief "in the principle of separation of powers" and their "desire to avoid the example of England, where, the Framers believed, elected officials had been subverted by appointments to office by the Crown" (Pet. App. B, p. 20). While recognizing "the limited nature of the relationship between the Executive branch and a private citizen who may be an inactive Reserve Officer" (*id.* at 26), the court held that membership in the inactive Reserves is an "office under the United States" under Article I, Section 6, Clause 2 "in light of the

purpose of the Framers, who erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States" (*ibid.*).

The court of appeals affirmed without opinion, "on the basis of the memorandum opinion of the District Court" (Pet. App. A, p. 16). The court further stated (*ibid.*): "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962)."

SUMMARY OF ARGUMENT

I

Respondents' complaint asserts that as "citizens and taxpayers of the United States" they have been injured by the presence of Reservists in Congress because such presence deprives them of unbiased consideration of various military matters. Such allegations constitute merely general grievances about the conduct of government, *Flast* v. *Cohen*, 392 U.S. 83, 106, and do not confer on respondents the type of personal stake in the outcome of the controversy sufficient to establish standing. *Ex Parte Levitt*, 302 U.S. 633; compare *Sierra Club* v. *Morton*, 405 U.S. 727, with *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), No. 72–535 (decided June 18, 1973).

No decision of this Court or the federal appellate courts even arguably confers standing upon a citizen who asserts an "injury" to the common interest,

shared by all, in constitutional governance. The absence of support for such standing wisely reflects the understanding that to accept as plaintiffs those who assert ideological interests divorced of any concrete impact would place in jeopardy the role of federal courts under Article III of the Constitution. If so tenuous a nexus with legal issues were accepted as sufficient to invoke the judicial process, the federal courts would be required to give essentially advisory opinions in a rising number of ideological debates.

II

The complaint presents no justiciable issue. Article I, Section 6, Clause 2 of the Constitution prohibits membership in Congress by persons holding any "[o]ffice under the United States." By its terms, history, and long Congressional construction, the Clause constitutes a qualification for membership in the Congress—no one occupying such an office may serve as a Senator or Representative.

In seeking a declaration that this Clause bars inactive Reservists from sitting in Congress and injunctive relief against officials of the Defense Department to prevent alleged violations of this Clause, respondents are attempting to obtain a judicial determination of the qualifications of members of Congress to serve in that body. This is a determination which, under Article I, Section 5, Clause 1 of the Constitution, only the Congress may make. Thus there is a "textually demonstrable constitutional commitment of

the issue to a coordinate political department," and the complaint raises a political question which the courts should not and do not adjudicate. *Baker* v. *Carr*, 369 U.S. 186, 217; *Powell* v. *McCormack*, 395 U.S. 486, 517, 518.

III

A commission in the inactive Reserves is not an "Office under the United States" within the meaning of Article I, Section 6, Clause 2. The history of the Clause shows that the Framers intended it to prohibit members of Congress from receiving or holding other federal offices which could lead to domination and corruption of the legislative branch by the executive branch. The minor and infrequent contacts these reservists have with the military authorities in the executive branch pose none of the dangers the Framers sought to guard against in Article I, Section 6, Clause 2.

Our view is confirmed by judicial decisions establishing that an "officer" of the United States is someone whose duties are "continuing and permanent, not occasional or temporary," because the concept of officer "embraces the ideas of tenure, duration, emolument and duties." *United States* v. *Hartwell*, 6 Wall. 385, 393. Reserve commissions do not have these latter characteristics, as Congress has recognized by passing legislation declaring that a member of the Armed Forces Reserve does not hold an "office of trust or profit * * * under * * * the United States." 5 U.S.C. 2105 (d).

ARGUMENT

I

RESPONDENTS HAVE NO STANDING TO MAINTAIN THIS ACTION

Respondents' complaint alleges that the presence of congressmen in the military reserves deprives them, as "citizens and taxpayers of the United States," of a right to unbiased consideration "of measures before the Congress affecting the military establishment and appropriations therefor * * * and measures relating to military action, war and peace" (Pet. App. C, p. 42). They seek an adjudication that Article I, Section 6, Clause 2 bars congressmen from membership in the military reserves. The district court found that respondents have standing as citizens but not as taxpayers. The court of appeals agreed that citizenship standing exists and appeared to say that taxpayer standing exists as well. We think it clear that standing is not present under either of these theories.

No decision of this Court provides any arguable support for respondents' assertions of standing. Indeed, even those decisions most hospitable to claims of standing expressly disavow the concept's extension to litigants like respondents. This uniformity of precedent reflects, we believe, the Court's recognition that to accord standing where plaintiffs allege only an interest in governmental affairs, common to all citizens and taxpayers, would be to place in jeopardy the role of federal courts under Article III of the Constitution. Were so tenuous a nexus with legal issues to be accepted as sufficient to invoke the judicial process,

the federal courts would be required to give essentially advisory opinions in a rising number of ideological debates.

1. The concept of standing, never sharply defined in any event, has in recent years undergone an expansion accomplished primarily through judicial acceptance of new categories of cognizable injury, such as injuries to health and aesthetic enjoyment. But this multiplication of categories in no way casts doubt upon the importance, and continued existence, of a strictly-enforced requirement that plaintiffs show a personal stake in an issue rather than a generalized interest. *Linda R. S.* v. *Richard D.*, No. 71–6078 (decided March 5, 1973), slip op. at 3–4. Examination of the leading recent cases on standing demonstrates the accuracy of that proposition and the defectiveness of respondents' standing allegations.

In *Sierra Club* v. *Morton*, 405 U.S. 727, the Court held an intense but generalized interest in the subject under dispute insufficient to confer standing. Plaintiff Sierra Club sought a declaratory judgment that the proposed development of Mineral King Valley, a national game refuge, contravened applicable federal laws and regulations, and also sought an injunction restraining the federal officials involved from granting their approval or issuing the requisite permits. Suing as a membership corporation, Sierra Club alleged "a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country" (405 U.S. at 735, n. 8) and claimed standing under § 10 of the Administrative Procedure Act.

Mr. Justice Stewart's opinion for the majority noted that loss of aesthetic and environmental well-being, like economic well-being, may amount to an injury in fact. *Id.* at 734. But Sierra Club had not alleged that it or its members would suffer any such loss of well-being. There was no allegation, for example, that members of Sierra Club used Mineral King for recreational purposes. The pleadings disclosed only disapproval of the effect of a proposed development upon natural beauty. The Court responded:

> But a mere "interest in a problem," no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization "adversely affected" or "aggrieved" within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. [405 U.S. at 739—740.]

The interest of respondents here, Reservists Committee to Stop the War, is no more specific, direct, or

personal than that of the Sierra Club. Respondents have only a special interest in what they believe to be the proper construction of a constitutional provision. They allege no direct or immediate harm to themselves, no "injury in fact." They are in the position of the taxpayer in *Frothingham* v. *Mellon*, 262 U.S. 447, who sought, unsuccessfully, "to employ a federal court as a forum in which to air his generalized grievances about the conduct of government or the allocation of power in the Federal System." See *Flast* v. *Cohen*, 392 U.S. 83, 106.

To be contrasted with *Sierra Club* and the present case is the decision in *United States* v. *Students Challenging Regulating Agency Procedures* (*SCRAP*), No. 72-535 (decided June 18, 1973). Plaintiffs there complained that agency action might harm the forests, streams, mountains and other resources in the Washington Metropolitan Area that they used for camping, hiking, fishing, and sightseeing. That, unlike the *Sierra Club* allegations, provided an assertion of direct injury.[3] The Court's opinion was careful to note that

[3] A relaxation of the standing concept is mistakenly attributed to *SCRAP* because of the vagueness with which the injury was alleged. But that, as the opinion makes clear, was acceptable because the issue was merely the sufficiency of pleadings:

"Of course, pleadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action. And it is equally clear that the allegations must be true and capable of proof at trial. But we deal here simply with the pleadings in which the appellees alleged a specific and perceptible harm that distinguished them from other citizens who

"appellees alleged a specific and perceptible harm that *distinguished them from other citizens* who had not used the natural resources that were claimed to be affected." Slip op., p. 18 (emphasis added). That, of course, is precisely what respondents' allegations in the present suit do not do—the allegations do not distinguish them, in terms of specific and perceptible harm, from any other citizens or taxpayers in the United States.

Since standing still requires an allegation of real injury, as the comparison of *Sierra Club* and *SCRAP* demonstrates, it follows that *Ex parte Levitt*, 302 U.S. 633, is directly in point here. A citizen brought suit to disqualify a Justice of this Court on the ground that his appointment and confirmation violated the "ineligibility" provision of Article I, Section 6, Clause 2 of the Constitution.[4] Standing was so obviously lacking that this Court dismissed the action in a *per curiam* decision:

> The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of

---

had not used the natural resources that were claimed to be affected." [Slip op., pp. 17–18.]

To the railroads' objection that the allegations did not name specific forests, lumbering camps, or extractive facilities in the area, the Court replied that they could have moved for a more definite statement. *Id.*, at 18–19, n. 15.

[4] Levitt relied upon the first half of the clause while respondents here rely upon the second half of the same clause.

> executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public. [302 U.S. at 634.]

In the face of this decisional law it is extraordinary that both courts below conferred standing upon respondents.[5]

---

[5] The other federal courts of appeals have repeatedly held, contrary to the opinion below, that a plaintiff who asserts merely his status as a citizen lacks standing to challenge executive or Congressional action. In *Velvel* v. *Nixon*, 415 F. 2d 236, 238 (C.A. 10), certiorari denied, 396 U.S. 1042, the court held that a citizen lacks a "personal stake in the matter" of whether the war in Vietnam was illegal, noting that plaintiff's contention that the war threatens his liberties, creates inflation, and destroys lives are "so patently anything but personal that to pose the question of whether appellant's 'citizen standing' is sufficient, is also to answer it." 415 F. 2d at 238. Granting standing to a citizen as citizen would, the court concluded, permit "every citizen to contest every congressional or executive action of general import and the doctrine of standing will have lost all meaning." *Ibid.*

The same result has been reached in a variety of other contexts. *E.g.*, *Troutman* v. *Shriver*, 417 F. 2d 171, 174 (C.A. 5), certiorari denied, 397 U.S. 923 (citizen lacks standing to challenge constitutionality of Economic Opportunity Act); *Lamm* v. *Volpe*, 449 F. 2d 1202, 1204 (C.A. 10), certiorari denied, 405 U.S. 1075 (citizen lacks standing to challenge constitutionality of Highway Beautification Act); *Sharrow* v. *Brown*, 447 F. 2d 94 (C.A. 2), certiorari denied, 405 U.S. 968 (citizen lacks standing to enforce Fourteenth Amendment requirement that representation in Congress be reduced in proportion to denial of right to vote); *Pietsch* v. *President of the United States*, 434 F. 2d 861, 863 (C.A. 2), certiorari denied, 403 U.S. 920 (citizen lacks standing to challenge legality of war in Vietnam); *Mottola* v. *Nixon*, 464 F. 2d 178, 180–181 (C.A. 9) (same); *DaCosta* v. *Laird*, 471 F. 2d 1146, 1150–1152 (C.A. 2) (same).

2. The district court offered four reasons for that decision but none of them withstands analysis. We will take them up separately.

> First, while any injury which might result from Congressmen holding Reserve commissions is hypothetical, the hypothesis is not concocted by plaintiffs but underlies the constitutional provision itself. Like a conflict-of-interest statute, the constitutional bar addresses itself to the potential for undue influence rather than to its realization. [Pet. App. B, p. 30.]

This argument misconstrues the rationale of the standing concept. The objection to standing here is not that the injury is hypothetical but rather that it is an "injury" only to a general interest, common to all citizens, in constitutional governance. It is a *Sierra Club* or *Levitt* injury rather than a *SCRAP* injury. The analogy to conflict-of-interest statutes is enlightening, for such statutes are, of course, not enforceable in court by any citizen who has merely a general interest in seeing them observed.

> Second, the issue tendered is a narrow one and involves a precise self-operative provision of the Constitution. This is not a case where plaintiffs seek "to employ a federal court as a forum in which to air [their] generalized grievances about the conduct of government or the allocation of power in the Federal System." *Flast* v. *Cohen* [392 U.S.] at 106. [Pet. App. B, pp. 30–31.]

The court suggested, apparently, that standing here will not create too many problems if citizens are confined to litigating "narrow" issues under "precise

self-operative" provisions of the Constitution. The premise is illusory. It is illusory in this very case because, if respondents have standing, this Court is called upon to determine whether the issue is nonjusticiable since it involves the qualifications of members of Congress, and Article I, Section 5 makes each House the judge of the qualifications of its own members, and also whether the holding of the types of reserve commissions involved here constitutes "holding an Office under the United States." These are issues which, it will be seen, are far from "narrow" and whose presence destroys the notion that the clause involved stands alone so that it is either "precise" or "self-operative." Many provisions of the Constitution are seemingly as precise and self-operative, but upon textual, contextual, and historical analysis, few of them turn out to be that way. This one certainly does not.

> Third, the interest in maintaining independence among the branches of government is shared by all citizens equally, and since this is the primary if not the sole purpose of the bar against Congressmen holding executive office, the interest of plaintiffs as citizens is undoubtedly one which was intended to be protected by the constitutional provision involved. [Pet. App. B, p. 31.]

Since one would be hard pressed to think of any constitutional provision not intended to protect the interest of citizens, this passage from the district court's opinion merely urges that cases like *Levitt*, *supra*, *Laird* v. *Tatum*, 408 U.S. 1 (standing lacking

to enforce the First Amendment when plaintiffs could not allege injury to themselves from challenged intelligence operations), *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (standing lacking to enforce the Fourteenth Amendment against a club's racially discriminatory membership policy when plaintiff alleged no desire to be a member), be overruled so that any citizen may litigate any constitutional hypothetical he finds interesting. That is not a reason for finding standing but the abandonment of the requirement of standing.

> Finally, there can be no doubt that this is a "case or controversy" in the common meaning of those words; the parties sharply conflict in both their interests and their views, and the case was ably briefed and argued. It is not irrelevant to note that if these plantiffs cannot obtain judicial review of defendants' action, then as a practical matter no one can. [Pet. App. B, p. 31.]

This was a "case or controversy" only in the non-constitutional meaning of those words. The only controversy is about the meaning of language, and there is only a case because the district court found standing. The reasoning is circular and inadequate. Nor should a court have to withhold its ruling on standing until it sees whether the merits are "ably briefed and argued." The further suggestion that standing exists because no one else may have standing is, whatever its accuracy,* revolutionary in its implications. It means

---

* To the suggestion that an individual claiming title to a position in the reserves held by a Congressman could maintain *quo warranto*, the court replied that the "contingency of such a suit is remote and is unrelated to the question whether a

that standing is to be accorded plaintiffs who have not suffered injury in fact whenever it appears that nobody has suffered injury in fact. That has never been the law and, as we will show, there are good reasons why it should never become the law.

In any event, the district court's remark seems to assume that this provision of the Constitution can be given effect only through litigation. Even if that were true, it would not be enough to accord standing. Article III policies prevent judicial enforcement of other provisions. For example, the duty of a state to extradite a prisoner cannot be judicially enforced, *Kentucky* v. *Dennison*, 24 How. 66; the duty to ensure that laws are faithfully executed may not be judicially compelled, *Mississippi* v. *Johnson*, 4 Wall. 475; and violation of the guaranty of a republican form of government in the states is not assailable in the courts, *Pacific Telephone Co.* v. *Oregon*, 223 U.S. 118.

Moreover, the assumption is erroneous. Congress has explicit authority to safeguard its independence through its power to judge the qualifications of its members, and

---

general public interest is being harmed by the challenged practice of allowing Congressmen to hold Reserve commissions" (Pet. App. B, p. 31). Whether or not the contingency is remote cannot decide the issue, since there are many constitutional provisions which, for one reason or another, cannot be vindicated in courts. Moreover, any such suit would decide the general principle and would, as do many private litigations over particular benefits, vindicate the general public interest. One might as well assert that the litigation in *Brown* v. *Board of Education*, 347 U.S. 483, being about the right of particular black children to attend a few segregated schools, was not related to the general public interest of whether enforced segregation violated the Equal Protection Clause of the Fourteenth Amendment.

Congress has exercised that authority on many occasions.[7] In fact, the Executive has safeguarded the value at stake. The Secretary of Defense has ordered congressmen removed from positions in the reserves that involved any significant degree of activity and pay.[8]

The reasons given by the district court for finding that respondents have standing as citizens are so vulnerable to analysis that the real basis for its decision is probably its observation that "in this Circuit the [standing] concept has now been almost completely abandoned" (Pet. App. B, p. 27).

3. The court of appeals thought the issues in this case occasioned no need for an opinion and relied upon the district court's opinion, adding, however, the remark (Pet. App. A, p. 16): "We are also of the view that plaintiffs have the requisite standing and that their claim is judicially enforceable under the rationale of *Flast* v. *Cohen*, 392 U.S. 83 (1968), and *Baker* v. *Carr*, 369 U.S. 186 (1962)." This may have been intended to suggest that *Flast* and *Baker* support, respectively, taxpayer and citizenship standing in this case. In fact, they do not.

Flast created only a very limited exception to the holding in *Frothingham* that a federal taxpayer is without standing to challenge the constitutionality of federal action. The *Flast* opinion said the crucial question is whether the plaintiff has "the personal stake and interest that impart the necessary concrete adverseness to such litigation" so that his invocation of the judicial process will be "consistent with the con-

[7] See *infra*, pp. 36–40.

[8] See *infra*, p. 48, n. 19.

stitutional limitations of Article III." 392 U.S. at 101. For that reason, *Frothingham* was not an absolute bar to taxpayer standing, since a taxpayer "may or may not have the requisite personal stake in the outcome, depending upon the circumstances of the particular case." 392 U.S. at 101.

The Court insisted upon a "nexus between the status asserted by the litigant and the claim he presents * * *." 392 U.S. at 102.

> The nexus demanded of federal taxpayers has two aspects to it. First, the taxpayer must establish a logical link between that status and the type of legislative enactment attacked. Thus, a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the taxing and spending clause of Art. I, § 8, of the Constitution. It will not be sufficient to allege an incidental expenditure of tax funds in the administration of an essentially regulatory statute. * * * Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged. Under this requirement, the taxpayer must show that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8. When both nexuses are established, the litigant will have shown a taxpayer's stake in the outcome of the controversy and will be a proper and appropriate party to invoke a federal court's jurisdiction. [392 U.S. at 102–103.]

The taxpayers in *Flast* established the "logical link" between their status as taxpayers and the enactment challenged, because the challenged programs (under the Elementary and Secondary Education Act of 1965) involved substantial amounts of federal tax funds being expended under the General Welfare Clause of Article I, Section 8. The Court considered the second aspect of the test satisfied by the assertion that the expenditure violated the Establishment Clause of the First Amendment, because the history of that Clause showed that it was specifically designed to prohibit the use of the federal taxing and spending power to aid religion. 392 U.S. at 104. The Court expressly reserved judgment on whether there are *any* other clauses in the Constitution that could be considered "specific limitations" on the taxing and spending power sufficient for standing purposes.* Finally, the Court summarized the narrow exception to *Frothingham* being carved out (392 U.S. at 105–106):

> * * * we hold that a taxpayer will have standing consistent with Article III to invoke federal

---

*Mr. Justice Stewart and Mr. Justice Fortas filed concurring opinions (392 U.S. at 114 and 115), expressing their views that *only* the Establishment Clause was a sufficiently specific limitation upon the congressional power to tax and spend to authorize taxpayer standing.

Various commentators have reached the same conclusion as Justices Stewart and Fortas. Note, *Constitutional Law-Establishment Clause-Standing*, 57 Ill. Bar J. 236, 244 (1968); Note, *Constitutional Law-Federal Taxpayer's Standing to Challenge Constitutionality of Federal Statutes*, 17 Journal of Public Law 419, 422–424 (1968); Note, *Constitutional Law-Standing to Sue: What Remains of the Frothingham Rule?*, 48 Neb. L. Rev. 536, 540–552 (1969); Note, *Standing-Taxpayers Allowed to Challenge Federal Expenditures*, 42 Temple L.Q. 70, 75–76 (1968).

> judicial power when he alleges that congressional action [1] under the taxing and spending clause is [2] in derogation of those constitutional provisions which operate to restrict the exercise of the taxing and spending power. * * *

Flast, therefore, does not support respondents' claimed taxpayer standing in this case. The opinion requires that each of two tests be met and respondents fail to meet either. By no stretch of the imagination can the situation complained of, the presence of congressmen in the reserves, be called congressional action under the taxing and spending clause. Moreover, the constitutional provision invoked was designed, as respondents and we agree, to prevent domination of the legislative branch by appointment of its members to offices in other branches of government. The provision was not, as required by *Flast*, designed as a limitation upon Congress' power to tax and spend.

The court of appeals' citation of *Baker* v. *Carr*, 369 U.S. 186, in support of respondents' standing here is something of a mystery since nothing about that case suggests, not even remotely or tangentially, that standing exists here. The *Baker* complaint was filed by residents of counties underrepresented in the Tennessee legislature. "Their constitutional claim," this Court noted, "is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting

population." 369 U.S. at 207. The Court had no difficulty finding that the dilution of a citizen's right to vote was an injury sufficient to give him standing:

> A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally, cf. *United States* v. *Classic*, 313 U.S. 299; or by a refusal to count votes from arbitrarily selected precincts, cf. *United States* v. *Mosley*, 238 U.S. 383, or by a stuffing of the ballot box, cf. *Ex parte Siebold*, 100 U.S. 371; *United States* v. *Saylor*, 322 U.S. 385.
>
> It would not be necessary to decide whether appellants' allegations of impairment of their votes by the 1901 apportionment will, ultimately, entitle them to any relief, in order to hold that they have standing to seek it. If such impairment does produce a legally cognizable injury, they are among those who have sustained it. They are asserting "a plain, direct and adequate interest in maintaining the effectiveness of their votes," *Coleman* v *Miller*, 307 U.S., at 438, not merely a claim of "the right, possessed by every citizen, to require that the Government be administered according to law * * *." *Fairchild* v. *Hughes*, 258 U.S. 126, 129; compare *Leser* v. *Garnett*, 258 U.S. 130. [369 U.S. at 208.]

Standing existed in *Baker* v. *Carr* because the state had impaired plaintiffs' vote in comparison with other voters in Tennessee. That was a direct injury to an identifiable group. Perhaps the court of appeals in this case thought the claims here of a right to un-

biased congressmen is the same as the claim to a vote unimpaired by malapportionment. It is not.

The former, being an interest of all citizens in good government, does not confer standing. Respondents' claim is like an attempt by interested citizens to enforce Article I, Section 9, Clause 8 by asking a court to require a congressman to give back a scroll accepted as a gift from the Queen of England. The *Baker* Court was careful to distinguish just such cases, pointing out that plaintiffs' standing did not, and could not, rest on the grievance, common to all citizens, that their state government was not being administered according to law (369 U.S. at 208).

4. The case law that denies respondents standing here grows out of and protects a basic constitutional value: the Article III role of the federal judiciary and the institution of judicial review. It would, we believe, be unwise to place that crucial value in jeopardy, which would be the result if respondents were permitted as citizens to litigate their grievance about congressmen in the military reserve.

The connection between standing in this case and the impairment of the judicial function is easily shown. There are in this nation innumerable organizations and individuals committed to the advancement of special interests and ideological causes of all descriptions. Some of them are, quite legitimately, devoted to litigation as a principal means of attaining their ends, but they can do so only through plaintiffs who can show the injury in fact the standing concept requires. Should this constitutional requirement be

abandoned, there would be an enormous multiplication of the number of groups and persons who would accept with alacrity the opportunity to press their general interests and debate their ideological theorems in federal courts. The adverse practical consequences of such a development for the federal judicial system are apparent.

The problem is frequently put in the form: "the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' *Baker* v. *Carr*, 369 U.S. 186, 204, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' *Flast* v. *Cohen*, 392 U.S. 83, 101" (*Sierra Club* v. *Morton, supra*, 405 U.S. at 732). This capsulated statement contains considerations that are worth explicating.

The necessity of adversary presentation requires little comment. It is our traditional mode of discovering facts and framing legal principles. Effective advocacy assists the court by drawing attention to the variety of ways in which facts may be viewed and rules framed, and by sharpening the issues to aid in reaching an informed decision. Lack of adversariness is one reason federal courts have eschewed giving advisory opinions and refuse to hear friendly suits. Dropping the requirement of a personal stake in the controversy would very likely result in a decline in the vigor of adversary presentation in many cases, though in other cases commitment to general causes or ideological stances might provide the needed vigor.

The standing requirement also reduces the number of cases brought to the federal courts. This consideration may not be decisive but it cannot be overlooked at a time when the judiciary is faced with the critical problems of seriously overcrowded dockets and maintaining the quality of its work. See, generally, Friendly, *Federal Jurisdiction: A General View* (1973).

More fundamental issues, deeply implicating Article III policies, appear when we consider that the standing requirement usually insures that issues, particularly the most profound constitutional issues, do not come to the courts as abstractions but in a developed factual context. A state or federal statute called into question, a state or federal executive action challenged, is presented by a party who has suffered a specific injury and can thus demonstrate to the court the way the law or action actually impinges upon him and society. The importance of this factor, subsumed in the phrase "presented * * * in a form historically viewed as capable of judicial resolution," can hardly be overestimated.

Our jurisprudence prides itself on building up great principles, with their necessary qualifications and exceptions, out of repeated decisions of specific controversies. The issues are formulated, the rules announced, and later interpretations qualified by the concrete settings in which the disputes occur. All of this is lost if litigants who do not have a specific in-

terest in a concrete dispute are permitted to challenge the constitutionality of statutes the moment they become effective, without time to see how the statute operates, whom it hurts and in what way. Instead, courts would be asked to decide immediately the abstract constitutionality of measures whose real impacts and problems they cannot possibly fully appreciate or evaluate.

A federal judiciary placed in this position becomes the giver of advisory opinions. Judges will be called upon to assess the constitutionality of the measures enacted by Congress and fifty state legislatures the moment they become law. They will no longer be the community's agency of sober, second thought but rather, in the absence of particularized factual disputes, they will of necessity repeat the legislative process that has just terminated and become something very much like the Council of Revision that the Framers rejected.

Considerations such as these, we believe, underlie this Court's continued insistence upon the standing requirements. The *Sierra Club* opinion notes, citing De-Tocqueville, that "judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury." 405 U.S. at 740–741, n. 16. *Sierra Club* also states that "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, *Muskrat* v. *United States*, 219 U.S. 346 * * *." 405 U.S. at 732, n. 3. Should standing requirements be effectively abandoned, as the district court

viewed the law in the District of Columbia Circuit (Pet. App. B, p. 27) and as respondents here in effect ask, the result would be the same as if Congress had conferred that jurisdiction.

II

THE COMPLAINT DOES NOT PRESENT A JUSTICIABLE ISSUE

The complaint sought a declaration that the holding of commissions in the Armed Forces Reserve by members of Congress violated the prohibition of Article I, Section 6, Clause 2 of the Constitution against membership in Congress by persons "holding any Office under the United States" and injunctive relief against the top officials of the Department of Defense designed to limit and prevent the alleged violations. We submit that the constitutional issue thus raised is not a justiciable controversy because it constitutes an attempt to obtain a judicial determination of the qualifications of members of Congress to serve in that body. That is a determination which, under Article I, Section 5, Clause 1 of the Constitution, only the Congress may make. The complaint, therefore, raises a political question which the courts should not and do not adjudicate. Cf. *Baker* v. *Carr*, 369 U.S. 186, 217; *Powell* v. *McCormack*, 395 U.S. 486, 517, 518.

A. A NON-JUSTICIABLE POLITICAL QUESTION IS PRESENTED IF THE ISSUE SOUGHT TO BE LITIGATED IS COMMITTED TO A COORDINATE POLITICAL DEPARTMENT OF THE GOVERNMENT.

"It is well established that the Federal courts will not adjudicate political questions * * * primarily be-

cause of the separation of powers within the Federal Government" (*Powell* v. *McCormack, supra,* 395 U.S. at 518). One of the touchstones for determining when a case presents a non-justiciable political question is whether there is "a textually demonstrable constitutional commitment of this issue to a coordinate political department" (*Baker* v. *Carr, supra,* 369 U.S. at 217). "In order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution. In other words, we must first determine what power the Constitution confers upon the House through Art. I, § 5 * * *" (*Powell* v. *McCormack, supra,* 395 U.S. at 519).

The precise issue on this facet of the case, therefore, is whether the provision in Article I, Section 5, Clause 1, that "Each House shall be the Judge of the * * * Qualifications of its own members" gives each house the authority to determine whether membership in the Armed Forces Reserves constitutes "holding Office under the United States," which precludes the holder from being "a Member of either House during his Continuance in Office." If, as we contend, the issue relates to the qualifications of members of Congress, then it is for Congress alone, and not for the courts, to make that determination.

The authority of each House to judge the qualifications of its own members necessarily requires that its judgment upon that question be exclusive, since otherwise each House would not in fact be performing that function. Moreover, Congress is in the best position to make that determination, because of its comprehensive

knowledge of the requisites of effective service in the legislature. "Of course each House of Congress, not the Court, is 'the Judge of the Elections, Returns, and Qualifications of its own Members'" (Mr. Justice Douglas, concurring in *Baker* v. *Carr, supra,* 369 U.S. at 242, n. 2; cf. *Roudebush* v. *Hartke,* 405 U.S. 15; Cooley, *Constitutional Limitations,* p. 189 (7th ed., 1903); *Application of James,* 241 F. Supp. 858, 860 (S.D.N.Y.)).

B. THE DETERMINATION WHETHER MEMBERSHIP IN THE ARMED FORCES RESERVES BARS A PERSON FROM SERVING AS A MEMBER OF CONGRESS BECAUSE IT CONSTITUTES THE HOLDING OF AN OFFICE UNDER THE UNITED STATES IS WITHIN THE EXCLUSIVE AUTHORITY OF CONGRESS

1. The text and structure of the constitutional provision show that the prohibition is a qualification for membership in Congress.

Article I, Section 6, Clause 2 of the Constitution provides in pertinent part:

> * * * no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

It prohibits any person from serving "as a Member of either House" while he holds "any Office under the United States." It thus provides as one qualification for membership in the Congress that the member not hold any office under the United States.

In both text and structure this provision is similar to the qualifications for membership in Congress which are contained in Article I, Sections 2 and 3. They provide that "No person shall be" a representative or senator "who shall have not attained" the

ages of 25 and 30 years and have been a citizen of the United States for 7 to 10 years, respectively, and "be an Inhabitant of that State" in which he is chosen. The wording "No person shall be" a representative or senator parallels the structure of Article I, Section 6, Clause 2, that "no Person holding any Office under the United States, shall be a Member of either House."

This Court recognized in *Powell* v. *McCormack, supra,* 395 U.S. at 520, that the three conditions for membership specified in Article I, Sections 2 and 3 are "qualifications." It left open, however, the question whether other constitutional limitations upon membership in Congress, including the prohibition upon membership by any person holding an office under the United States, also are qualifications for membership under Article I, Section 5 (*ibid.*, n. 41). In *Roudebush* v. *Hartke, supra,* the Court subsequently ruled that one of the qualifications for membership in the Senate, which the Senate has power to judge, is the requirement in the 17th Amendment that "a Senator be elected by the people of his State" (405 U.S. at 26, n. 23). The requirement that a member not hold any office under the United States is, we submit, another qualification for membership.[10]

---

[10] Dionisopoulos, *A Commentary on the Constitutional Issues in the Powell and Related Cases*, 17 Journal of Public Law 103, 108, 115 (1968); Note, *The Power of a House of Congress to Judge the Qualifications of Its Members*, 81 Harvard L. Rev. 673, 674 (1968); Hobbs, *Comments on Powell* v. *McCormack*, 17 U.C.L.A. L. Rev. 129, 147–48 (1969); Note, *Constitutional Law—Separation of Powers—Article I, Section 6, Clause 2 Renders a Commission in the Armed Forces Reserve Incompatible with Membership in the Congress*, 40 Geo. Wash. L. Rev. 542, 549–558 (1972).

2. The history of Article I, Section 6, Clause 2 shows that it provides a qualification for membership in Congress.

Article I, Section 6, Clause 2 provides in its entirety:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

This provision contains two prohibitions: Congressmen, while serving in that capacity, cannot be appointed to any office under the United States; and no person holding such office can become a Congressman. Thus, a person who, while a Congressman, is appointed to another office cannot continue as a Congressman; and no holder of any office, whether he obtained it before or after his election to Congress, can be a member. Both of these limitations constitute qualifications for service in Congress; one who holds any office under the United States, no matter when he obtains it, is ineligible to serve in that body.

The history of Article I, Section 6, Clause 2 confirms the conclusion that it prescribes qualifications for Congressmen. The first draft of the clause submitted by the Committee on Style provided (II Farrand, *The Records of the Federal Convention of 1787*, hereafter cited as "Farrand," p. 180 (1937 ed.)):

> The members of each House shall be ineligible to, and incapable of holding any office under the authority of the United States, during the time for which they shall respectively be elected: and the members of the Senate shall be ineligible to, and incapable of holding any such office for one year afterwards.

In that form, the Clause made members of Congress ineligible to hold any office under the United States during their service in Congress and, in the case of Senators, for one year thereafter. It did not, however, bar someone from becoming a member of Congress—which is what the qualification requirements are designed to control—merely because he already held an office under the United States.

The second portion of Clause 2, making the holders of office ineligible to serve in Congress, was added by the Committee of 11, which considered matters on which decision had been postponed on the floor of the convention (II Farrand, p. 483). That Committee recommended the following substitute language (*ibid.*):

> The members of each House shall be ineligible to any civil Office under the authority of the United States during the time for which they shall respectively be elected—And no Person holding any office under the United States shall be a Member of either House during his continuance in office.

Although there was substantial debate on the "eligibility" portion of Clause 2 (see the discussion in Point III, *infra*, pp. 44–46), there was no debate

on the "membership" portion at the Constitutional convention,[11] and little during the state ratification debates.[12] There is, however, a crucial statement in *The Federalist* which reflects the understanding of the framers that Clause 2 provided qualifications for membership in Congress. In No. 52 of *The Federalist*, Madison wrote:

> The *qualifications of the elected* * * * have been very properly considered and regulated by the Convention. A representative of the United States must be of the age of twenty-five years; must have been seven years a citizen of the United States, must at the time of his election, be an inhabitant of the State he is to represent, *and during the time of his service must be in no office under the United States.* [Cooke ed., 1961, pp. 354–355, emphasis added.]

The evolution of Clause 2 thus shows that, "[w]hile the original clause declared Congressmen ineligible for executive office, the final version declares office holders ineligible to be members of Congress—they are not 'qualified' to hold such a position." Note, *supra*, 40 Geo. Wash. L. Rev. 542, 551.

The district court concluded, however, that Article I, Section 6, Clause 2 "was intended simply to declare the incompatibility" of executive office and a seat in

---

[11] Farrand notes only that "The last clause rendering a Seat in the legislature [and] an office incompatible was agreed to nem: con:." II Farrand, p. 492.

[12] See III Farrand, pp. 148, 201, 314. Luther Martin, in his *Genuine Information*, observed that "the acceptance of an office vacates their seat, nor can they be reelected during their continuance in office." III Farrand, p. 201.

Congress, and that Article I, Section 5 "does not bar judicial consideration of the question whether executive action must be taken to carry out a constitutional mandate" (Pet. App. B, pp. 32, 34). While the original version of Article I, Section 6, Clause 2 declared Congressmen ineligible for Executive Office, the final version makes office holders ineligible to be members of Congress. Although the present suit seeks relief only against the Executive Branch, in order to grant such relief the district court was required to decide whether a commission in the Armed Forces Reserve is an office under the United States. That determination, however, involves passing upon the qualifications of Congressman, and under Article I, Section 5, Clause 1, only Congress can exercise that function.

3. *Congress consistently has treated the prohibition in Article I, Section 6, Clause 2 against holding an office under the United States as a qualification for membership.*

For more than 150 years, Congress has treated Article I, Section 6, Clause 2—both the prohibition against any person holding an office under the United States from serving in Congress and that against members of Congress being appointed to any such office—as constituting a "qualification" for membership in Congress, of which, as early as 1807, Congress viewed itself as "the sole judge" (17 *Annals of Congress* 871 (1852)).[13] In 1817 the House held hearings to

[13] The extensive history of Congressional enforcement of Article I, Section 6, Clause 2 is set forth in 1 Hinds' *Precedents of the House of Representatives* (hereafter, "Hinds"), §§ 485-506, pp. 592-636 (1907); and 6 Cannon, *Precedents of the House of Representatives* (hereafter, "Cannon"), §§ 60-65, pp. 64-79 (1936).

determine whether it should refuse to seat Representative Herrick of Ohio, because he had continued to serve as United States Attorney after his election. Although the House voted to seat Herrick after he had resigned that position, its inquiry whether to exclude him established a precedent for future exclusions. 1 Hinds, pp. 602, 624–627. Seven years later (in 1824), the House considered a challenge to the eligibility for membership of Representative John Bailey, who was elected while he was a clerk in the Department of State. Debates and Proceedings in the United States Congress, 18th Cong., 1st Sess.[14]

In 1864 the House considered the case of Frank P. Blair, Jr., who had been elected a representative after he had been appointed a major-general of volunteers. Blair resigned his military office a month after Congress convened. The House resolved that Blair had "decline[d] and disqualif[ied] himself to hold the office of Representative * * *." 1 Hinds, pp. 601–603; See H. Rep. No. 110, 38th Cong., 1st Sess., pp. 9–10. In 1901 the House Committee on the Judiciary concluded that Joseph Wheeler, who had been elected a representative in 1898 while serving as a major-general in the United States volunteers, never was a member of Congress, since "[b]y holding the office in the Army the civil office is declined," and therefore

---

[14] These and other early decisions discussed in the text are to be given great weight in determining the intent of the framers, for "the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787." *Powell* v. *McCormack*, *supra*, 395 U.S. at 547.

"[i]t follows that Joseph Wheeler never held the office of Representative * * *." 1 Hinds, pp. 628–632.

Similarly, Congress has vacated the seats of members who accepted executive office after being seated. In 1803, the House resolved that Representative John P. Van Ness had "forfeited his right to a seat as a Member of this House" because he had been appointed and served in the District of Columbia as a major in the militia, under the authority of the United States. 1 Hinds, pp. 592–593. In 1805, the House resolved that Representative Samuel Hammond had "vacated his seat in this House" because he had accepted a commission under the United States as colonel commandant from Louisiana. 1 Hinds, pp. 593–594. The House Committee on Elections reported in 1846 that Representative Edward R. Baker "has not been entitled to a seat" after he had accepted an appointment and served as colonel of volunteers from the State of Illinois; the House took no action, however, because he resigned his seat. 1 Hinds, pp. 594–595. The House resolved in 1862 that Representative Vandever "has not been entitled to a seat" in Congress "since he was mustered into the military service of the United States" as a colonel in the infantry. 1 Hinds, pp. 597–599. Finally, in 1898 the House Committee on the Judiciary recommended a resolution that four Representatives had "vacated their seats" by accepting commissions in the Army of the United States and being mustered into active duty; the House, however, did not vote on the resolution. 1 Hinds, pp. 612, 620–621.

In addition to considering whether particular Congressmen were disqualified because of their holding

of office, Congress also considered whether certain categories of positions are "Office[s] under the United States" which disqualify the holder for membership. In 1806, following extensive debate over the meaning of Clause 2, the House rejected a resolution that "a contractor under the Government of the United States is an officer within the purview and meaning of the Constitution, and, as such, is incapable of holding a seat in this House." 1 Hinds, p. 622. In 1825, the House debated at length the appointment of members of Congress to executive office, and adopted a resolution calling on the President to submit a list of all members so appointed since the founding of the government. The President complied. 1 Hinds, p. 592, n. 4.

In 1916, the House directed its Judiciary Committee to study whether any Representatives were disqualified "by reason of such Members holding commissions in the National Guard of the various States." 6 Cannon, p. 64. The Committee reported that Representatives holding such commission were disqualified; that the seats of Members accepting such commissions "will at once become vacant"; and that "[t]he only action necessary would be to declare such vacancy by resolution as a matter of convenience and to aid the Speaker and others in discharging their public duties." The House, however, did not act upon the report. 6 Cannon, p. 67 [15]

[15] The House voted in 1919 to pay all arrears of salary of Representatives who had been absent from the House while in the military service of the United States during World War I, with a deduction for their compensation received for such emergency service. 6 Cannon, pp. 67–68.

Congress has also determined that service by members of Congress in various offices, including directors of public institutions and members of presidentially-appointed commissions, does not violate Article I, Section 6, Clause 2. See 1 Hinds, pp. 604–611; 6 Cannon, pp. 69–75.

Although Congress has not decided whether a reserve commission constitutes an office under the United States, it has considered the question. On May 15, 1963, Senator Goldwater raised on the floor of the Senate the question of the propriety of Reservists serving in that body. The merits of the issue were discussed on the Senate floor by Senators Goldwater, Gore, and Hickenlooper. 109 Cong. Rec. 8715–8717. Senator Goldwater pointed out that "the Senate is the judge of the qualifications of its own Members," and, in order to resolve the matter, submitted a resolution which directed the Senate Judiciary Committee "to determine whether the holding of a commission as a Reserve member of any of the Armed Forces by any individual is incompatible with the holding of office by such individual as a Member of the Senate * * *." *Id.* at 8717. The Senate adopted the resolution. 109 Cong. Rec. 8718. Senators Goldwater and Holland subsequently inserted into the Congressional Record material indicating that Reservists may serve in Congress. 109 Cong. Rec. 10000–10002, 10574–10578, 13211–13214.

The Senate Judiciary Committee took no action on the resolution, and the House Judiciary Committee took no action on similar resolutions of the House.

H. Res. 352, 88th Cong., 1st Sess.; H. Res. 353, 88th Cong., 1st Sess.; H. Res. 369, 88th Cong., 1st Sess; H. Res. 377, 88th Cong., 1st Sess.; H. Res. 41, 89th Cong., 1st Sess. Similarly, Congress has not acted on bills that would have required Congressman in the active reserve to transfer to the inactive reserves. *E.g.*, H. R. 5940, 89th Cong., 1st Sess.

As the foregoing discussion shows, Congress repeatedly and consistently has treated the holding of office under the United States as involving the qualifications of its members. In the exercise of its power under Article I, Section 5, Clause 1 to determine those qualifications, it has considered whether the holding of a particular office, either by an individual Congressman or as a general matter, disqualifies the holder from serving in Congress. This consistent interpretation by the Congress of its own authority under the Constitution, like the settled opinion of other expert bodies on matters committed to their jurisdiction, is entitled to great weight. See, *Myers* v. *United States*, 272 U.S. 52, 175, and cases there cited.

The cases discussed above dealt largely with the status and exclusion of individual Congressmen. The present case, on the other hand, involves more than 100 members of Congress (see *infra*, p. 43). It could be argued that since it is unrealistic to think that Congress would take any action that could result in the exclusion of so substantial a portion of its membership, the earlier Congressional precedents should not be interpreted to cover the present situation.

The earlier precedents were cited, however, only to show that Congress consistently has viewed the determination whether a particular office is an office under the United States as involving a qualification for membership, of which it is the sole judge under Article I, Section 5, Clause 1. The fact that the ruling may affect a substantial number of Congressmen is relevant only to the question of the appropriate Congressional action to deal with such disqualification but not the question whether Congress is the body to make the ruling.

In any event, if the Congress were to declare that the holding of reserve commissions disqualifies the holder from serving in that body, it is unlikely that many of its members would either quit that body or be expelled or denied their seats. It is much more likely that they would resign from the reserves. Indeed, in urging the Senate in 1963 to decide whether it is permissile for Senators to serve in the reserve (see *supra*, p. 40). Senator Goldwater stated that if the Senate "decides that a Member of the Senate cannot serve in the Senate at the same time that he is serving as an officer in the Reserves * * * I am sure that we would follow such admonition" (109 Cong. Rec. 8717). There is no reason to believe that most Senators would choose to "follow such admonition" by resigning from the Senate rather than by quitting the reserves.

It is thus for Congress, and not for the courts, to decide the issue on the merits raised in this case: whether members of Congress who hold reserve commissions are barred from serving as "a Member of either House during his Continuance in Office."

III

A COMMISSION IN THE ARMED FORCES RESERVE IS NOT AN OFFICE UNDER THE UNITED STATES UNDER ARTICLE I, SECTION 6, CLAUSE 2.

Our submission is that, in any event, a reserve commission is not an "Office under the United States" as that phrase is used in Article I, Section 6, Clause 2.[16] We rely upon (1) the history of the Clause, which shows that the Framers intended it to prohibit members of Congress from receiving or holding other federal offices which could lead to domination and corruption of the legislative branch by the executive branch, and the fact that the holding of reserve commissions by members of Congress does not pose that danger; (2) judicial decisions holding that an "officer" of the United States is someone whose duties are "continuing and permanent, not occasional or temporary," since the concept of officer "embraces the ideas of tenure, duration, emolument, and duties" (*United States* v. *Hartwell*, 6 Wall. 385, 393)—characteristics which reserve commissions do not have; and (3) federal legislation declaring that a member of the Armed Forces Reserve does not hold an "office of trust or profit * * * under * * * the United States" (5 U.S.C. 2105(d)).

---

[16] In addition to the 107 members of the 93rd Congress who hold reserve commissions, Senator Tower is a boatswain's mate third class in the Naval Reserve. Whatever one may conclude about the status of reserve commissions as offices under the United States, Senator Tower's position is not within that category.

A. THE HOLDING OF RESERVE COMMISSIONS BY MEMBERS OF CONGRESS DOES NOT INVOLVE THE EVIL AT WHICH THE CLAUSE IS DIRECTED.

1. *The Clause was intended to prohibit members of Congress from receiving or holding other federal offices that could lead to domination and corruption of the legislative branch by the executive branch.*

The provision that became Article I, Section 6, Clause 2, which was part of the Virginia Resolutions in the Constitutional Convention, provided that members of Congress would be "ineligible to any office established by a particular State, or under the authority of the United States * * * during the term of service" and for one year thereafter." (I Farrand, pp. 20–21).[14] The resolution was initially adopted without debate (I Farrand, pp. 210–211), but the views of the delegates were developed during a subsequent debate on removing the provision barring appointment to office for a year after the term expired. See I Farrand, pp. 375–377, 379–382.

The delegates knew that "for a long succession of years the votes of members of Parliament had been bought, with money or office, by nearly every minister who had been at the head of affairs." 2 Curtis, *His-*

[14] The resolution also provided that Representatives be incapable of reelection for a period to be specified, and that they be subject to recall. This portion of the resolution was rejected without debate. See I Farrand, p. 210.

[15] The Articles of Confederation had contained a similar ineligibility provision, stating that a State delegate should not be "capable of holding any office under the United States for which he, or another for his benefit receives any salary, fees or emoluments of any kind." Charles Warren, *The Making of the Constitution*, p. 613 (2d ed., 1937).

tory of the Constitution of the United States, pp. 242, 243 (1861 ed.). One delegate referred to "the example of [Great Britain] where men get into [Parliament] that they might get offices for themselves or their friends. This was the source of the corruption that ruined their Govt" (I Farrand, p. 376 (remarks of Mr. Butler)). George Mason agreed that "by the sole power of appointing the increased officers of government, corruption pervades every town and village in the kingdom [of Great Britain]" (*id.*, pp. 380–381). He added that "it is necessary to shut the door against corruption. If otherwise, they may make or multiply offices, in order to fill them" (*id.*, p. 380).

After a proposal to remove the additional one-year disability failed by a tie vote (*id.*, p. 382), Madison proposed that legislators be barred from appointment only to offices that Congress had established or for which it had increased the emoluments (*id.*, p. 386). John Rutlidge opposed this motion, urging that the legislature be kept "as pure as possible, by shutting the door against appointments of its own members to offices, which was one source of its corruption" (*ibid.*). Mason also opposed the motion, referring again to Great Britain (*id.*, p. 387), and the proposal was defeated (*id.*, p. 390). The delegates then voted to delete the requirement barring appointment for one year after the term ended, and made minor editorial changes (*ibid.*).

The provision was referred to the Committee on Detail which modified the language slightly (II Farrand, pp. 129–130). The delegates then rejected a pro-

posal to limit the ineligibility to offices under the United States "for which they, or any other for their benefit, receive any salary, fees, or emoluments of any kind—and the acceptance of such office shall vacate their seats respectively" (*id.*, pp. 282, 284, 287, 289), and deferred further consideration of the Clause after Gouvenour Morris proposed an exception from the ban on appointment to offices for "offices in the army or navy: but in that case their offices shall be vacated," because of the possibility that the citizen most capable of conducting a war might be a member of Congress (*id.*, p. 289). Mr. Randolph, although agreeing to Mr. Morris' exception, opposed striking the Clause "as opening a door for influence and corruption" (*id.*, p. 290).

After the Committee of 11 had considered the Clause, it recommended the substitute language quoted *supra*, p. 34, which introduced the second section of the Clause making the holders of other federal offices ineligible for membership in Congress. Following debate on the first section of Clause 2, during which the delegates adopted the prohibition on appointments "to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased" during the member's term of office (*id.*, pp. 490–492), the Clause was unanimously adopted (*id.*, p. 492). There was no debate on the ineligibility section, Madison noting that "[t]he last clause rendering a Seat in the Legislature and an office incompatible was agreed to nem: con:" (*ibid.*). The Committee on Style then made minor editorial changes (*id.*, pp. 568, 593).

This history shows that the purpose of the "ineligibility" portion of the Clause was to eliminate "any improper bias in the vote of the representative, and to secure to the constituents some solemn pledge of his disinterestedness" (1 Story, *Commentaries on the Constitution of the United States,* p. 633 (5th ed., 1891)). It sought "to avoid as much as possible every motive for corruption" (III Farrand, p. 148), and, as Madison noted, it was enacted in response to "the great danger [which] was in creating new offices * * *" (*id.,* p. 314). Although the delegates did not discuss the disqualification section, Story suggests that it was intended to prevent "any undue influence from office, either upon the party himself or those with whom he is associated in legislative deliberations" (1 Story, *supra,* p. 635). And in *The Federalist,* No. 76, Hamilton pointed out that the entire Clause 2 "provided some important guards against the danger of executive influence upon the legislative body" (*id.,* p. 514 (Cooke ed., 1961)).

In sum, the history of Clause 2 shows that the Framers' intent was to avoid the possibility of improper influences upon and corruption of members of the legislative branch that could result from the power of the executive branch to appoint members to office. Like many of the provisions of the Constitution, the resolution of this problem was a compromise; the Framers did not bar all such appointments, but only those to offices created or for which the emoluments were increased during the member's term. The corollary protection provided in the second section of the Clause was to insure that persons already subject to

such influence as officers of the United States could not serve in Congress while holding such office. Perhaps the reason for the lack of any debate about this section is that it was obvious that membership in Congress by federal officers necessarily posed precisely the dangers that the Framers were attempting to avoid, and the Committee on Style included the prohibition out of an abundance of caution to make explicit what everyone had assumed would be the situation anyhow.

The two sections of the Clause are thus complimentary, and directed against the same evil: the improper interrelationship between members of the executive and legislative branches that could result if members of the latter also held office in the former. As we now show, the holding of reserve commissions by members of Congress does not pose that problem.

2. The holding of reserve commissions by members of Congress poses no danger of improper influence upon Congress by the executive branch

The 107 members of Congress who hold reserve commissions are in two categories: Standby Reservists and Retired Reservists.[10] Standby Reservists, in turn,

[10] There is a third category of reservists—the Ready Reserve—in which Congressmen cannot serve. Department of Defense Directive 1200.7, § V, C, 2 (July 2, 1970), 32 C.F.R. 125.4(c)(2), directed the transfer of "Members of the Legislative and Judicial Branches" in the Ready Reserves "to the Standby Reserve, the Retired Reserve, or discharged, as appropriate."

Two members of Congress—Representative Montgomery and Senator Saxbe—are in the Army National Guard and thus in the Ready Reserve. See 10 U.S.C. 269(b). Neither may be transferred to the Standby Reserve without the consent of the governor of his state, 10 U.S.C. 269(g); hence DOD Regulation 1200.7, *supra*, could not be applied to them. The district court

may be in active or inactive status.[20] Both categories of reservists, however, have only minimum obligations to and connection with the Armed Forces.

These reservists are not required to participate in military training,[21] they are not generally subject to military discipline,[22] their commissions are "for an indefinite time" and, with certain limitations, are "held during the pleasure of the President."[23] They receive no pay or compensation, except for retirement pay which Retired Reservists receive only if they have com-

---

noted, however, that its decision had no application to these Congressmen (Pet. App. B, p. 23, fn.) Representative Montgomery had informed us that, although he is listed as being in a pay status (Pet. App. D, p. 49), he has declined pay since 1964.

[20] There are 31 Congressmen holding commissions in the Standby Reserve, of whom 19 are in active status and 12 in inactive status (Pet. App. D). (Representative Roberts, listed as a member of the active reserve, is now in retired status.) There are 74 Congressmen in retired status, 58 of whom are not receiving retirement pay and 16 of whom are (*ibid.*). In addition to those shown as retired reservists not receiving retirement pay, Congressmen Frenzel (USNR, Lt. Minnesota), Danielson (USNR, Lt., California) and Thornton (USNR, Lt., Arkansas) are in that category. Congressmen Bennett, shown as a member of the Retired Reserve drawing retired pay, resigned his commission in 1963 and is no longer in the Reserves.

[21] Retired reservists and Standby Reservists on the inactive status list ordinarily are not permitted to drill. See Department of Defense Directive 1235.9, section IV (September 13, 1967), 32 C.F.R. 136.3.

[22] The Uniform Code of Military Justice is inapplicable to Standby Reservists on the inactive status list, and applies to Retired Reservists only when they are receiving hospitalization. 10 U.S.C. 802(5). Active status Standby Reservists are subject to the Code only while on training under orders voluntarily accepted by them. 10 U.S.C. 802(3).

[23] 10 U.S.C. 593(b), 1161 (a) and (b).

pleted a certain amount of service and have reached a certain age, and which is "in the nature of a pension." [24] They are largely ineligible for promotion,[25] their voluntary training is at their own expense,[26] and only active duty Standby Reservists may earn credit for retirement.[27] Active Standby Reservists are subject to being called to active duty for 15 days annually;[28] other than that these Reservists may be mobilized only in the same situation as any other citizen: when Congress declares war or a state of national emergency.[29]

The minor and infrequent contacts these reservists have with the military authorities as a result of their membership in the Reserves pose none of the dangers of domination and corruption of the legislative branch by the executive branch that the Framers sought to guard against in Article I, Section 6, Clause 2. The approximately 100 Reservists in Congress are in no different position from the thousands of other reservists who are not members of the legislative branch. It is unrealistic to think that a member of Congress would

[24] 48 Comp. Gen. 699, 701; see 10 U.S.C. 273(c), 1331, 3911, 8911.

[25] Retired reservists are ineligible for promotion, 10 U.S.C. 3360(a), 5891(a), 8360(a), as are inactive status Standby Reservists. 10 U.S.C. 273(c). Active status Standby Reservists may be promoted but not to the general or flag officer grades. Department of Defense Directive 1235.9, section IV, A, 5 (added March 3, 1970).

[26] Department of Defense Directive 1215.6, section IV, E, 4 and IV, F, 3 (June 12, 1971). As noted above, only active status Standby Reserves may train at all.

[27] 10 U.S.C. 1334(a); Department of Defense Directive 1215.6, *supra*.

[28] 10 U.S.C. 672(b).

[29] See 10 U.S.C. 267(b), 672(a), 802.

be influenced in his decisions and actions by the possibility of either a promotion (of the very limited type available) in the Reserves if he favored the military's position or a denial of promotion or termination of his commission if he took the contrary view. This is not the kind of action the executive branch is likely to use, or that is likely to have any effect, toward influencing the behavior of members of Congress.

Although the district court recognized "the limited nature of the relationship between the Executive branch and a private citizen who may be an inactive Reserve officer," it stated that its holding was necessary "in light of the purpose of the Framers, who erected an inflexible barrier against Congressmen holding or being appointed to any other office under the United States" (Pet. App. B, p. 26). But this statement assumes that membership in the Reserves is an "Office under the United States," which is the issue in the case.

The district court also stated that "while less than one-fourth of the members of the 91st Congress were Reserve officers, those members were disproportionately representated on the Committees concerned with military affairs" (*id.*, pp. 26–27). But it is hardly surprising that members of Congress who have shown their interest and gained experience in military matters through service in the Reserves would be selected to serve on the committees dealing with those matters. Committee assignments understandably are made to take advantage of the members' particular abilities. For example, the Judiciary Committees traditionally have been composed of lawyers. The fact that many

members of the Reserves serve on the military affairs committees neither indicates nor suggests that the Executive Branch is exerting improper influences upon Congress with respect to military matters through members who hold Reserve commissions.

B. THE CONCLUSION THAT A RESERVE COMMISSION IS NOT AN OFFICE UNDER THE UNITED STATES IS SUPPORTED BY THE FACT THAT HOLDERS OF RESERVE COMMISSIONS ARE NOT OFFICERS OF THE UNITED STATES.

Various statutes impose limitations and prohibitions upon officers of the United States. Because there is a close relationship between such officers and offices under the United States—in most, and perhaps all instances, the concepts are co-extensive—the cases defining "officer" of the United States are relevant in determining what constitutes an "office" under the United States.

The leading case is *United States* v. *Hartwell*, 6 Wall. 385. The question was whether a clerk in the office of an Assistant Treasurer of the United States was an officer of the United States, and hence subject to criminal prosecution for violation of a statute punishing embezzlement of government funds by such officers. In holding that the clerk was an officer, the Court stated (p. 393) that the term "office" "embraces the ideas of tenure, duration, emolument, and duties," and pointed out (*ibid.*) that the defendant's "duties were continuing and permanent, not occasional or temporary." See also *United States* v. *Maurice*, Fed. Cas. No. 15,747, p. 1214 (Cir. Ct. Va.). Where, however, the duties are only "occasional and intermittent" and

the individual "is only to act when called on * * * in some special case," he is not an officer of the United States. *United States* v. *Germaine*, 99 U.S. 508, 512.

Under these standards, Congressmen who hold Reserve commissions are not officers of the United States.[*] As explained above (pp. 49–50), their duties are only "occasional and temporary"—they rarely perform any military duties and act only "when called on * * * in some special case"; their position lacks "tenure" or "duration," since they serve at the pleasure of the President; and they receive no "emoluments" during their service.

These considerations are reflected in *Simmons* v. *United States*, 55 Ct. Cl. 56, where the Court of Claims held that an inactive Reservist was not an "officer of the United States" within the meaning of a statute precluding such "officers" from prosecuting claims against the government. The court reasoned that, unlike members of the regular Armed Forces,

> * * * an officer of the Reserve Corps has no salary or emolument of office. He is not in time

---

[*] Congress has itself used the definition set forth in *United States* v. *Hartwell*, *supra*, in determining whether a particular office constitutes an office under the United States within the meaning of Article I, Section 6, Clause 2. It "accept[ed] this as a correct definition" when it considered whether members of the National Guard held an office under the United States in 1916. See H. Rep. No. 885, 64th Cong., 1st Sess., quoted in 6 Cannon, p. 65. Earlier, when it considered whether a wide variety of officers were within the constitutional prohibition, the House Judiciary Committee relied on the definition in *Hartwell*. H. Rep. No. 2205, 55th Cong., 3d Sess., p. 48; see discussion on floor at 39 Cong. Rec. 3849.

> of peace, except perhaps while discharging some duty to which he may have been lawfully called and assigned under the act of June 3, 1916, or other act, amenable to the Army regulations or court-martial. He has no defined duties to discharge * * *. [55 Ct. Cl. at 57.]

See 45 Comp. Gen. 405, which drew a similar distinction in concluding that a Reservist, not on active duty, was not an officer of the United States under the same statute. See, also, *Taussig* v. *McNamara*, 219 F. Supp. 757, 761–762 (D.D.C.), affirmed *per curiam* C.A.D.C., April 6, 1964 (unreported), certiorari denied, 379 U.S. 834 (distinguishing Reserves from Regular Army).

C. CONGRESS HAS RECOGNIZED THAT A RESERVIST DOES NOT HOLD AN OFFICE UNDER THE UNITED STATES

1. In 1930, in response to a ruling of the Attorney General that Reservists were officers of the United States and hence ineligible as lawyers to prosecute claims against the United States, Congress amended Section 37 of the National Defense Act, which dealt with reservists, to provide as follows (the provision is now codified in 5 U.S.C. 2105(d)):

> A Reserve of the armed forces who is not on active duty or who is on active duty for training is deemed not an employee or an individual holding an office of trust or profit or discharging an official function under or in connection with the United States because of his appointment, oath, or status, or any duties or functions performed or pay or allowances received in that capacity.

"[A]n office of trust or profit * * * under * * * the United States" is an "Office under the United States." Congress thus determined in 1930 that inactive reservists—as all the Congressmen who hold reserve commissions are—do not hold offices under the United States.

The district court ruled (Pet. App. B, pp. 25–26), however, that the legislative history of the 1930 statute shows that it had only the "narrow purpose" of overruling the Attorney General's ruling rather than the broader purpose of defining "Office of the United States" as not including reserve commissions. Although the report of the House Committee on Military Affairs stated that a purpose of the bill was "to remedy a condition occasioned by" the Attorney General's ruling, the report further stated that the bill was proposed "so as to more clearly define the status of reserve officers not on active duty or on active duty for training only * * *" (H. Rep. No. 1884, 71st Cong., 2d Sess., pp. 2, 3).

The House Report then quoted with approval the report of the War Department, at whose request the bill was introduced (H. Rep. No. 1884, *supra*, p. 3), which stated:

> The proposed legislation * * * meets deficiencies in existing law which does not clearly define the civil status of reserve officers who are not on active duty or who are on active duty in time of peace. Reserve officers who are members of the bar are therefore in some doubt as to their status in litigation in which the Government is involved. Many other reserve offi-

cers who are interested in the civil affairs of their own States are similarly in doubt as to their status under State constitutions many of which deny State offices to citizens who are officials of the Federal Government.

The report of the Senate Committee on Military Affairs copied the House Report. See S. Rep. No. 1102, 71st Cong., 2d Sess. On the Senate floor, Senator Couzens, who led the discussion on the bill explained the bill's purpose:

> Mr. COUZENS. Mr. President, the bill involves quite an intricate question, affecting reserve officers who may hold office in the Government in addition to the office which they hold in the military service. There is a constitutional inhibition against an officer in the military service holding two offices. There are officers in the Reserve Corps who are Members of the Senate and who are also Members of the House of Representatives, as there are reserve officers holding other governmental positions.
>
> In consultation with the chairman of the Committee on Military Affairs the other day—and I am sorry he is not now present—he went into the matter very thoroughly with me, because of inquiries I was receiving from the reserve officers. I do not believe that I misquote the Senator from Pennsylvania when I say that he doubts whether this proposed legislation will remedy the situation. However, it is an attempt to do so by amending the law so as *to provide that reserve officers shall not be considered as officers referred to in the Constitution.* In order to relieve the officers who are in the Reserve

> Corps and who are holding other governmental offices, from possible liability under the Constitution, it was thought that the passage of this was necessary [72 Cong. Rec. 11881, emphasis added].

Senator Walsh, although stating that it would be of "questionable propriety" to provide that "all laws applicable to officers in the military service of the United States shall not be deemed applicable to reserve officers * * *," also said that "I think it is eminently advisable that some legislation be enacted so that the reserve officers will not fall under the inhibitions to which officers in the Regular Army in active service are subjected * * *" (*ibid.*).

2. The district court relied on a 1916 House Judiciary Committee report concluding that a commission in the National Guard is an "Office under the United States" within the meaning of Article I, Section 6, Clause 2. The 1916 National Guard, however, was quite different from the present inactive Reserves. Under the National Defense Act of 1916, a National Guardsman had to assemble for drill and instruction at least 48 times each year; he had to participate in encampments, maneuvers or other exercises at least 15 days in training each year; he was subject to additional call for encampments, maneuvers or other exercises pursuant to regulations issued by the President; he was subject to military discipline; he received pay and allowances for the performance of his duties. 39 Stat. 206, 208-210. The House Report thus properly concluded that a commission in the Guard in 1916

"embraces the idea of tenure, duration, emoluments, and duties," and that the duties of a 1916 Guardsman were "continuing and permanent, not occasional and temporary." See 6 Cannon, p. 66.

3. The difference in the character of the military service and duties involved also distinguishes the cases discussed in Point II B 3 above, in which Congress and its committees concluded that various military positions constituted offices under the United States which disqualified the holders from membership in Congress. Representative Blair, denied his seat in 1864, had been in command of a corps of troops fighting in Tennessee during the Civil War when Congress met. See H. Rep. No. 110, 38th Cong., 1st Sess., p. 1; see also 1 Hinds, pp. 601–603. Likewise Representative Vandever was actually "mustered into the military service of the United States" as a colonel of volunteers during the Civil War. 1 Hinds, pp. 597–599. Representative Yell, a colonel of volunteers, was serving in Mexico during the Mexican War, 1 Hinds, p. 596, and Representative Baker, also a colonel of volunteers, "exercised" the responsibilities of his military office. 1 Hinds, pp. 594–595.[21] General Wheeler and the other Representatives whom the Judiciary Committee in 1901 recommended be removed from Congress, had been mustered into active duty during the Spanish American War. 1 Hinds, pp. 612, 620–621.

[21] Service in the "Volunteers" involved service on full-time active duty after being mustered into the Army. See Winthrop's *Military Law and Precedents*, p. 87 (2d ed. reprinted, 1920); Hill, *The Minute Man in Peace and War: A History of the National Guard*, pp. 29–30 (1964 ed.).

The earliest precedents involved Representative Hammond, who was appointed as the colonel commandant for the District of Louisiana under the government to be established there, 1 Hinds, pp. 593–594, and Representative Van Ness, excluded after he accepted and exercised the office of major of militia with the territory of the District of Columbia. 1 Hinds, pp. 592–593. This latter position involved an office equivalent to "a species of military police." Winthrop's *Military Law and Precedents, supra,* p. 56, n. 67.

In the one case involving an officer not on active duty, the House Judiciary Committee concluded that Major General Sickles, who was on the retired list when a representative, "was not such an officer as was inhibited by the Constitution from holding a seat in Congress." H. Rep. No. 2205, 55th Cong., 3d Sess., pp. 33, 64. This was in accord with the Committee's general conclusion that "persons on the retired list of the Army do not hold office under the United States in the constitutional sense" (*id.,* p. 64). As the Committee Report explained (*ibid.*):

> These persons are still in the service, but hold no office unless assigned to duty.
>
> To hold an office under the United States the person must occupy a public station or employment conferred by the appointment of government; and it embraces tenure, duration, emoluments, and duties.
>
> * * * * *
>
> And for the reason that retired Army officers are not entitled to promotion, do not perform

duty, and exercise no command, it is held that when retired they cease to be officers.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded to the district court with directions to dismiss the complaint.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

DANIEL M. FRIEDMAN,
Deputy Solicitor General.

LEONARD SCHAITMAN,
WILLIAM D. APPLER,
Attorneys.

AUGUST 1978.

U.S. GOVERNMENT PRINTING OFFICE: 1978

TABLE OF CONTENTS

	Page
Counterstatement of the Case	1
Counterstatement of Questions Presented	6
Summary of Argument	7
Argument	10
I. Respondents Have Standing	10
A. Standing as Citizens	10
B. Standing as Taxpayers	19
II. The Case Is Justiciable	25
A. The Incompatibility Clause Does Not Establish a "Qualification"	26
B. The Incompatibility Clause Reaches the Office as Well as the Seat	27
1. The purpose of the clause	28
2. "Acceptance of the second office vacates the first"	30
C. The Incompatibility Clause Imposes a Judicially Enforceable Duty Upon Petitioners	33
1. The right to sit in Congress is not an issue in this case	33
2. The incompatibility clause imposes a duty upon petitioners	34
III. Reserve Membership Is An Office Within the Meaning of the Incompatibility Clause	36
A. The Incompatibility Clause Reaches Reserve Office	37
B. The Simmons Case and 5 U.S.C. § 2105(d)	41
Conclusion	43

Page

APPENDICES 1a

Appendix A: Defeat of the 1965 Reserve Merger Plan 2a

Appendix B: Reservist-Congressmen's Support of the Reserve Officers Association's Legislative Programs 6a

Appendix C: Legislation Introduced by Reservist-Congressmen Providing Benefits for Reservists 18a

Appendix D: Reservists on the Senate Armed Services Committee; DOD Nominees 25a

Appendix E: Miscellany 27a

TABLE OF CITATIONS

CASES:

Abington School District v. Schempp, 374 U.S. 203 ..11, 16

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 .....11, 14, 15, 27

Baker v. Carr, 369 U.S. 186 .....11, 12, 18, 19, 25, 36

Barlow v. Collins, 397 U.S. 159 11

Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403, U.S. 388 18

Bradfield v. Roberts, 175 U.S. 291 16

Common Cause v. Democratic Nat'l Comm., 333 F. Supp. 803 (D.D.C. 1971) 12

Curran v. Laird, 480 F.2d 122 (D.C. Cir. 1969) 16

Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949) *rev'd on other grounds* 339 U.S. 763 (1950) 35

Environmental Defense Fund v. Hardin, 138 U.S. App. D.C. 391, 428 F.2d 1093 (1970) 12

Engel v. Vitale, 370 U.S. 421 16

Everson v. Board of Education 330 U.S. 1 16

Ex Parte Levitt, 302 U.S. 633 .....10, 16

Flast v. Cohen, 392 U.S. 83 .....8, 11, 14, 15, 17, 18, 19, 20, 25, 27 36

Frothingham v. Mellon, 262 U.S. 447 .....10, 16

In Re Neagle, 135 U.S. 1 (1890) 35

Investment Company Institute v. Camp, 401 U.S. 617 16

Kentucky v. Dennison, 24 How. 66 .....17, 18

Page

Kilbourn v. Thompson, 102 U.S. 168 (1881) 36
Laird v. Tatum, 408 U.S. 1 .....10, 17
Linda R. S. v. Richard D., 410 U.S. 614 .....16, 17
Louisiana ex Del. Gremillion v. NAACP, 366 U.S. 293 12
Luther v. Border, 7 How. 1 18
Marbury v. Madison, 1 Cranch 137 (1803) 34
Millard v. Robert, 202 U.S. 520 16
Mississippi v. Johnson, 4 Wall. 475 18
Montgomery v. State, 55 Fla. 97, 45 So. 879 (1908).. 35
Moose Lodge No. 107 v. Irvis, 407 U.S. 163 10,17
NAACP v. Alabama, 357 U.S. 449 12
NAACP v. Button, 371 U.S. 415 .....11, 12
Nat'l Ass'n for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973) 12
Nat'l Ass'n of Securities Dealers v. SEC, 420 F.2d 83 (D.C. Cir. 1969) aff'd sub nom. Investment Company Institute v. Camp, 401 U.S. 617 16
Pacific Tel. Co. v. Oregon, 223 U.S. 118 18
Powell v. McCormack, 395 U.S. 486 .....6, 26, 34, 36
Reade v. Ewing, 205 F.2d 630 (2d Cir. 19) 12
Reid v. Covert, 354 U.S. 1 (1957) 35
Rising v. Brown, 313 F. Supp. 824 (C.D. Cal. 1970).. 12
Scanwell Laboratories Inc. v. Shaffer 424 F.2d 859 (D.C. Cir. 1970) 16, 19
Scenic Hudson Preservation Conference v. F.P.C., 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 19
Shakeman v. Democratic Organization of Cook County, 435, F.2d 267, (7th Cir. 1970) *cert. denied*, 402 U.S. 909 12
Sierra Club v. Morton, 405 U.S. 727 .....10, 11, 12, 15, 17
Simmons v. United States, 55 Ct. Cl. 56 (1920)....9, 37, 41
United States v. Butler, 297 U.S. 1 (1936) 20
United States v. Gettysburg Electric Ry Co., 160 U.S. 668 20
United States v. Hartwell, 6 Wall. 385 .....9, 37, 41
United States v. S.C.R.A.P., — U.S. — 93 S.Ct. 2405 .....7, 10 11, 13, 15, 16
Williams v. Rhodes, 393 U.S. 23 12
Wilson v. Shaw, 202 U.S. 24 16

Page

CONSTITUTIONAL PROVISIONS:

Article I, §5 26
Article I, §6 25
Article I, §6, cl. 2 .....1, 6, 7, 14
Article I, §8 .....8, 17, 19, 20
Article III 10, 13
Amendment X 17
Amendment XVII 26

STATUTES:

5 U.S.C. §2105(d) 9, 37
10 U.S.C. §267(b) 2
10 U.S.C. §593 3
10 U.S.C. §593(b) 44
10 U.S.C. §672 .....2, 3
10 U.S.C. §672(a) 44
10 U.S.C. §672(b) 44
10 U.S.C. §672-74 2
10 U.S.C. §802 .....2, 3, 41
10 U.S.C. §1331 .....2, 3
10 U.S.C. §1332 2
28 U.S.C. §2202 6
P.L. 92-145, 92d Cong., 1st Sess. (1971) 21
P.L. 92-156, 92d Cong., 1st Sess. (1971) 20
P.L. 92-545, 92d Cong., 2d Sess. (1972) 22
P.L. 92-570, 92d Cong., 2d Sess. (1972) 22

FEDERAL RULES OF CIVIL PROCEDURE:

Rule 12(b)(7) 38
Rule 12(h) 38
Rule 19 .....9, 38
Rule 19(a) 38, 39, 40
Rule 19(b) 40

REGULATIONS:

DOD Directive No. 1200.7 (July 2, 1970) 40
DOD Directive No. 1215.6 (August 25, 1969; as amended June 12, 1971) 40, 44
DOD Directive No. 1235.9 (September 13, 1967) ...40, 44
35 Fed. Reg. 2871 3

Page

CONGRESSIONAL MATERIALS:

S. Rep. No. 92-359, 92d Cong., 1st Sess. (1971)..... 21
H.R. Rep. No 110, 38th Cong., 1st Sess. (1864) ..30, 31, 32, 33, 34
H.R. Rep. No. 2205, 55th Cong., 3d Sess., Appointment of Members of Congress to Military and Other Offices, Part I (1899) 29, 30, 39
H.R. Rep. No. 885, 64th Cong., 1st Sess. (1916) Right of a Representative in Congress to Hold a Commission in the National Guard 29, 37, 39, 41, 43
H.R. Rep. No. 1884, 71st Cong., 2d Sess. (1930) 42
H.R. Rep. No. 92-232, 92d Cong., 1st Sess. (1971) 21
H.R. Rep. No. 92-362, 92d Cong., 1st Sess. (1971) 21
72 Cong. Rec. 11628-29 (June 24, 1930) 42
72 Cong. Rec. 11892-93 (June 27, 1930) 42
Bartlett, *Cases of Contested Elections in Congress, 1834-1865* (1865) 29, 38
Clarke and Hall, *Cases of Contested Elections in Congress, 1789-1834* (1834) 37
1 Hinds, *Precedents of the House of Representatives* (1907) 29, 33

MISCELLANEOUS:

Berger Impeachment, The Constitutional Problems (1973) 18
Corwin, The Spending Power of Congress—Apropos the Maternity Act, 36 Harv. L. Rev. 548 (1923) .. 20
Davis, The Liberalized Law of Standing, 37 U. Chi. L. Rev. 450 (1971) 19
W. Dellinger, The Constitution as a Sword, 85 Harv. L. Rev. 1532 (1972) 18
Farrand, The Records of the Federal Convention of 1787 (1911) 23, 24, 29
Hamilton, The Federalist, No. 76 ..... 26, 29
A. Hill, Constitutional Remedies, 67 Colum. L. Rev. 1109 (1967) 18
Jaffe, Standing Again, 84 Harv. L. Rev. 633 (1971) .. 14
Madison, Notes of Debates in the Federal Constitution of 1787 (1966 ed.) 29
Note, 85 Harv. L. Rev. 507 (1971) 28, 41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1188

JAMES R. SCHLESINGER, Secretary of Defense, ET AL.,
Petitioners

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.
Respondents

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

This action challenges and seeks to end an open and notorious violation by petitioners, officials of the executive branch, of Article I, § 6, clause 2 of the Constitution. That provision, the Incompatibility clause, petitioners' Brief (Br.) 2-3, was intended to

prevent members of Congress from simultaneously holding any executive branch office. The violation at issue here is that the Secretaries of Defense and the subordinate Secretaries of the Army, Navy and Air Force (petitioners here) maintain members of Congress as officers or enlisted members of the armed forces reserves after they become and while they remain Senators and Representatives.

At the time this action was filed 130 Senators and Representatives, members of the 91st Congress, were reservists. The election of November 1970 reduced the number to 120 and the appointment of a member to the Cabinet reduced the number to 119 reservists in the 92d Congress. The number has been further reduced to 107 in the 93d Congress. Br. 43 n. 16; Pet. App. D.

Twenty-three are "active" reservists. As such they may participate in training (but without pay). Pet. App. D 49. They may thereby earn points toward retirement. At the time of the District Court's judgment (but no longer, by a new regulation promulgated by defendants) they also thereby earned points toward promotion. They can be ordered to active duty at any time for up to 15 days (or longer in a Congressionally declared national emergency). 10 U.S.C. § 672; Jt. App. 4, ¶ 10. While on such involuntary active duty or in voluntary training they are subject to military discipline and court martial under the Uniform Code of Military Justice. 10 U.S.C. §§ 267(b), 672-674, 802.

Fifty-five Congressmen are retired from the reserves without retirement pay. Pet. App. D 50. Some of them may be eligible to receive retirement pay at age 60. 10 U.S.C. §§ 1331, 1332. Sixteen are retired with pay. Pet. App. D 51. Twelve are in "inactive

standby" status. Pet. App. D 49. Retired and inactive standby reservists do not train, are not promoted, receive only retirement pay, are subject to call in a Congressionally declared national emergency and while on such involuntary active duty or while hospitalized in a military hospital (e.g., Walter Reed Hospital, Bethesda Naval Hospital; for retirees only) are subject to military discipline and court martial under the Uniform Code of Military Justice. 10 U.S.C. §§ 672, 802, 1331.

One hundred six of the 107 Congressmen-reservists are commissioned officers. Reserve officers below general and admiral are commissioned by the President and hold their commissions at his pleasure. Generals and admirals are nominated by the President and confirmed by the Senate. 10 U.S.C. § 593; Jt. App. 4, ¶ 12. Four of the members are major-generals and two are rear admirals. Pet. App. D.

Thus the head of the Executive branch has appointed Congressmen to hold reserve commissions and may remove them at his will. In certain circumstances he may call them to uniform or refrain from doing so, or call some and not others. Those whom he calls and others who may volunteer he may discipline. He may, and has in the past, provide Congressmen-reservists with pay, promotions and other perquisites of military office. (Jt. App. 5, ¶ 5; 35 Fed. Reg. 2871 (1970).[1] That these powers may be limited, either permanently by statute or temporarily by regulation, and may never have been abused, does not remove the potential for abuse.

---

[1] On the other hand, not a single Congressman-reservist has been called upon to serve in a national emergency since the end of World War II. Jt. App. 7, ¶ 20.

The temptation to the executive branch to exercise influence and the potential for reservist-Congressmen to find themselves in a conflict of interest is compounded by the fact that reservists in greatly disproportionate numbers hold key positions in the Congress, particularly in the committees concerned with military affairs, veterans affairs and appropriations. Jt. App. 5-6, ¶¶ 18-19; Pet. App. B. 26-27, fn. *. Moreover, they are all in a position to vote on such matters as military appropriations and retirement benefits for the benefit of reservists including themselves.

Not only, as the District Court found, Pet. App. B 26-27, 30, is there a substantial potential for conflict of interest between the Congressman's duties as a Congressman and his interest as a reservist. The public record is replete with instances of actual conflict. Some of these instances are collected in Respondent's Appendices (Resp. App.) A-E to this brief.

Resp. App. A describes the controversy in the Congress over an attempt by the then Secretary of Defense, Robert McNamara, to reorganize and reduce the armed forces reserves. It describes the role of Congressmen-reservists, influenced by their own status as reservists, in defeating the reorganization plan. Resp. App. B describes how the Reserve Officers Association and Congressmen-reservists work together on legislation of interest to the Association. Resp. App. C lists some representative legislation, and D and E collect other examples of conflict of interest.

The potential for executive influence and for Congressional conflict of interest would disappear and no more actual conflicts would arise if the Defense Department and the Armed Services, under the direction of

petitioners, did not continue to maintain Congressmen in the armed forces reserves. Respondents brought this action in May, 1970, in order to end the practice by enforcement of the earliest conflict of interest provision in our laws. Respondents alleged (Pet. App. C 41-42, 45-47) that executive branch influence resulting from violation of the Incompatibility clause taints Congressional consideration of respondents' and other like-minded citizens' views about the military, war and peace. Success in the action would in addition prevent continued appropriations of public moneys that—again in violation of the Incompatibility clause—may redound to the Congressmen's benefit as reservists, and prevent continued favoritism in reserve promotions and assignments to Congressmen to the detriment of other reservists including plaintiffs.

Respondents sought a declaratory judgment, injunction and mandamus. Petitioners filed a motion to dismiss, respondents moved and petitioners cross moved for summary judgment. Jt. App. 1. In April, 1971, on the basis of the pleadings and matters of public record of which it could take judicial notice[2] the District Court granted summary judgment for respondents on the underlying legal issues, holding (1) that respondents have standing to sue as citizens (but not as taxpayers or as reservists), Pet. App. B 27-31; (2) that a reserve commission is an office within the meaning of the Incompatibility clause, Pet. App. B 23-27; (3) that the purpose of the Incompatibility clause is to maintain separation of the legislative and executive powers and prevent executive branch influence on and subversion of members of the legisla-

[2] E.g., Resp. App. A and E were before the District Court in another form.

tive branch, Pet. App. B 20-22; and (4) that the duty of petitioners to carry out the Incompatibility clause by removing Congressmen from the reserves, and their failure to carry out that duty, are adjudicable by a court, Pet. App. B 31-34.

The District Court thereupon issued a declaratory judgment "that Article I, § 6, clause 2 of the Constitution renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office, . . ." Pet. App. B 34-36. But because of various factors, chiefly that "there is no reason to believe that Congress and the Executive will be unable to accommodate themselves voluntarily to the decision" if it be affirmed by this Court, the District Court withheld the specific equitable relief respondents had requested. Pet. App. B 35.

Petitioners appealed the grant of the declaratory judgment. Respondents did not appeal the denial of equitable relief.[3] In October, 1972, the United States Court of Appeals for the District of Columbia Circuit affirmed the District Court in a brief *per curiam* order. Pet. App. A.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Were the lower courts correct in holding:

a. That plaintiffs have standing to sue to enforce Article I, § 6, clause 2 of the United States Constitution (the Incompatibility clause);

b. That the purpose of the Incompatibility clause is to maintain separation of the legislative and execu-

[3] If respondents prevail in this Court and petitioners fail to take appropriate steps to comply with the law as here declared, respondents may petition the District Court for further specific relief. 28 U.S.C. § 2202; Powell v. McCormack, 395 U.S. 486, 499.

tive powers and prevent executive branch influence on and subversion of members of the legislative branch;

c. That the duty of defendants to carry out the Incompatibility clause by removing Congressmen from the reserves, and their failure to carry out that duty are adjudicable by a court;

d. That a reserve commission is an office within the meaning of the Incompatibility clause?

2. Were the lower courts correct, on the basis of these holdings, in issuing and affirming a declaratory judgment that Article I, § 6, clause 2 of the Constitution renders a member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office?

SUMMARY OF ARGUMENT

1. Respondents have standing to sue as citizens, as the lower courts held. Under the controlling decisions of this Court respondents have sufficiently alleged and have shown the necessary injury to their own interests. The interest protected by the Incompatibility clause is the interest in preventing executive branch influence upon and conflicts of interest among members of Congress. That this interest is widely shared, among all citizens, is no bar to standing. *United States* v. *S.C.R.A.P.*, — U.S. —, 93 S. Ct. 2405. Respondents have alleged injury to themselves. The violations of the Incompatibility clause challenged here, i.e., Congressmen holding military office, creates influence on Congressional decisions on military and especially reserve matters. This influence injures respondents' ability to persuade the Congress in directions favored by respondents. Such an injury, albeit

"political" in nature, is to a right protected by the First Amendment, the right of association to petition.

Respondents also have standing as taxpayers. As in *Flast* v. *Cohen*, 392 U.S. 83, respondents challenge expenditures under Article I, § 8 of the Constitution, the taxing and spending clause. The expenditures challenged here are made for "the common defense;" in *Flast* they were made for "the general welfare;" both purposes are of equal weight in Article I, § 8. Respondents also satisfy the second branch of the *Flast* test; they allege that the expenditures violate a specific constitutional prohibition. Whereas in *Flast* the prohibition was against supporting an establishment of religion in violation of the First Amendment, in this case the prohibition is against expending tax funds to support Congressmen's enjoyment of an executive branch office in violation of the Incompatibility clause.

2. The case is justiciable. The Incompatibility clause was not intended to create a "qualification" for membership in Congress like those of age, citizenship and inhabitancy. Instead it was intended to declare the incompatibility of holding both legislative and executive office. As such it declares that a member of Congress may not hold an office, as much as it declares that the holder of an office may not be a member of Congress.

Respondents do not seek the expulsion of Congressmen-reservists from the Congress, a matter which may be committed to the Congress alone. They seek a remedy to compel Executive officers to remove Congressmen-reservists from their office, a matter well within the power of the courts. Indeed this is the preferred remedy to remove the incompatibility—especially if

the member is elected to Congress while already a reserve officer: "the second office vacates the first."

Since the question of removal from executive office is not committed to the Congress by the Constitution, it is justiciable by the courts. Moreover, petitioners' own necessary participation in maintaining Congressmen in the office is subject to challenge in and adjudication by courts, for all branches are bound to obey the Constitution.

3. Reserve membership is an "office" within the meaning of the Incompatibility clause. "Office" involves "tenure, duration, emoluments, and duties." *United States* v. *Hartwell,* 6 Wall. 385, 393. A commissioned officer has "tenure;" reservists enlist for definite terms—"duration;" while on duty they are maintained out of government stores, lodged in government billets, transported in government vehicles and use government equipment and when retired they receive retirement pay—"emoluments;" they are subject to call and military discipline—"duties." Second, the definition of "office" must be examined with reference to the intention of the clause, to prevent executive influence on the legislature. Even the most attenuated characteristics of office create the danger of such influence and therefore must be held barred by the clause.

Neither a narrow Court of Claims decision, *Simmons* v. *United States,* 55 Ct. Cl. 56 (1920) nor a narrowly intended statute, 5 U.S.C. § 2105(d), change this. Both were directed solely at removing a possible bar against reservists who were attorneys representing claimants against the government.

ARGUMENT

I. RESPONDENTS HAVE STANDING

A. Standing as Citizens

1. Petitioners challenge respondents' standing to sue on the ground that respondents have not alleged injury but "only an interest in governmental affairs, common to all citizens and taxpayers . . .," Br. 10, relying on *Sierra Club* v. *Morton*, 405 U.S. 727. They seek to distinguish *United States* v. *S.C.R.A.P.*, — U.S. —, 93 S. Ct. 2405, on the ground that the dispositive factor was that the students' allegations of environmental and aesthetic injury to nature were localized to the vicinity of Washington, D. C. Br. 13-14. They rely on *Frothingham* v. *Mellon*, 262 U.S. 447, Br. 13, *Ex Parte Levitt*, 302 U.S. 633, Br. 16, 17, *Laird* v. *Tatum*, 408 U.S. 1, Br. 17 and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, Br. 18. They assert that there is no case or controversy here, Br. 18, and alternatively argue that if there is, respondents should take comfort in asserted (but at least here unexerted) authority of the Congress to vindicate the Incompatibility clause, and in action by one of the respondents, taken shortly after this case was filed, to reduce in part the benefits that Congressmen receive from reserve office, Br. 19-20. Finally they argue that to admit respondents' standing to sue here would swamp the federal courts with litigation. Br. 25-29.

The familiar decisions of this Court that have narrowed the obstacle of standing demonstrate a commitment to permitting important grievances of private citizens against an increasingly all-powerful government to be litigated in the courts, not fought in the streets. This development has marched carefully, nevertheless, within the confines of Article III "case

or controversy." This case is well within the principles thus established by this Court.

2. The basic requirement for standing is that the plaintiff allege "injury in fact." Such injury may be economic, *Association of Data Processing Service Organizations, Inc.* [*ADAPSO*] v. *Camp*, 397 U.S. 150; *Barlow* v. *Collins*, 397 U.S. 159; environmental or aesthetic, *United States* v. *S.C.R.A.P.*, — U.S. —, 93 S. Ct. 2405; *Sierra Club* v. *Morton*, 405 U.S. 727; political, *Baker* v. *Carr*, 369 U.S. 186, or religious, *Flast* v. *Cohen*, 392 U.S. 83; *Abington School District* v. *Schempp*, 374 U.S. 203. The injury may be to a narrow class, e.g., *ADAPSO, supra*, or it may be widely shared, *Sierra Club, S.C.R.A.P.*, both *supra*. The injury alleged must be such as was reasonably intended to be prevented by the statute or constitutional provision invoked. *ADAPSO, supra*, 397 U.S. at 153.

Allegations of "injury in fact" make out the showing of a "personal stake in the outcome of the controversy," *Baker* v. *Carr, supra*, 369 U.S. at 204, required to satisfy Article III, and ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen, supra*, 392 U.S. at 101, quoted in *ADAPSO, supra*, 397 U.S. at 151-52.

Here the respondents alleged in their complaint (Pet. App. C 41-42, 45-46) very specific injuries to their ability to influence the Congress, to join with others in an effort to make political advocacy effective, *NAACP* v. *Button*, 371 U.S. 415, 452 (dissenting opinion of Harlan, J.)—a right protected by the First

Amendment. See *Williams* v. *Rhodes*, 393 U.S. 23; *NAACP* v. *Button, supra; Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293, 296; *NAACP* v. *Alabama*, 357 U.S. 449, 460; see also *Shakeman* v. *Democratic Organization of Cook County*, 435 F.2d 267 (7th Cir. 1970) *cert. denied*, 402 U.S. 909; *Nat'l Ass'n for Community Development* v. *Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973); *Common Cause* v. *Democratic National Committee*, 333 F. Supp. 803 (D.D.C. 1971); *Rising* v. *Brown*, 313 F. Supp. 824, 826 (C.D. Cal. 1970). The impairment or dilution of a citizen's ability effectively to petition and advocate his views to the Congress is as much an injury as the mathematical dilution of his vote by malapportionment. *Baker* v. *Carr*, 369 U.S. 186.

Indeed this injury to respondents is widely shared, by all citizens who—for example—oppose legislation unduly favoring members of the Armed Forces reserves, Resp. App. C, D, or who would favor legislation abolishing the reserves, Resp. App. A. *Cf.* Pet. App. C 42, ¶ 16(c); 45, ¶ 30. But this Court has

> already made it clear that standing is not to be denied simply because many people suffer the same injury. Indeed some of the cases on which we relied in *Sierra Club* demonstrated the patent fact that persons across the Nation could be adversely affected by major governmental actions. See, e.g., Environmental Defense Fund v. Hardin, 138 U.S. App. D.C. 391, 428 F.2d 1093, 1097 (interests of consumers affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Reade v. Ewing, 2 Cir. 205 F.2d 630, 631-32 (interests of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration). To deny standing to persons who are in fact injured simply because many others are also in-

jured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion.

United States v. *S.C.R.A.P., supra,* —— U.S. ——, 93 S.Ct. at 2416.

S.C.R.A.P. also establishes that the fact that injury is not "direct and perceptible," and is found at the end of an "attenuated line of causation" does not bar standing to sue. — U.S. at —, 93 S.Ct. at 2416. Here, indeed, no such "attenuated line of causation" need be followed. The assumption that citizens' advocacy is expected to, can and does influence their elected government is at the heart of the constitutional compact. Any bar to the effectiveness of such advocacy likewise affects the outcome of governmental action on the issue involved. There could hardly be a more serious and important injury to a citizen, short of loss of his right to vote or the establishment of a form of government, contrary to the system of our Constitution, that would not be responsive to the views, opinions and advocacy of citizens.[4]

---

[4] The District Court held that than "any injury which might result from Congressmen holding Reserve Commissions is hypothetical," but that the "hypotesis is not concocted by plaintiffs but underlies the constitutional provision itself." Pet. App. B 30. The District Court did not permit discovery, *id.* 29. Respondents respectfully differ with the District Court on the question whether the injury is hypothetical, and the analysis in text and the appendices to this brief show how real the injury is. But respondents would agree with the District Court's unstated premise that, with a constitutional provision as narrow and as precise as this, an independent showing of injury to the plaintiffs may be unnecessary. Here the Framers themselves made the equivalent of a legislative finding that the evil the Incompatibility clause was intended to pre-

3. A second requirement of standing is that there be an ascertainable relationship between the injury alleged and the constitutional or statutory provision alleged to be violated. That is, the "interest sought to be protected by the complainant [must be] arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *ADAPSO, supra,* 397 U.S. at 153. Put another way, there must be "a logical nexus between the status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen, supra,* 392 U.S. at 102.

The purpose of the Incompatibility clause, Article I, § 6, cl. 2, whose violation by petitioners is at issue here, was to preserve the separation of powers—specifically to protect the independence of the legislative branch from the influence of the executive branch. Pet. App. B 18-22; pp. 22-24, 37-39, *infra.* It was designed to prevent actual or even the potential of a conflict of interest between a member of Congress' duty as a legislator and obligations owed to or pressure created by the executive if the member held or might expect appointment to executive branch office. *Ibid.* Here

---

vent created so great a danger of injury that the evil had to be absolutely prevented; respondents are therefore in the position of private attorneys general. Flast v. Cohen, 392 U.S. 83, 120 (dissenting opinion of Mr. Justice Harlan) and cases there cited; Jaffe, Standing Again, 84 HARV. L. REV. 633, 637-8 n. 24 (1971).

In their response to this passage in the District Court's opinion petitioners seem to admit that respondents indeed have alleged "injury," but that such injury is insufficient as a basis for standing because it is only to a "general interest." Br. 16. This concession would appear to dissolve petitioner's defense, for as long as the "interest" is within "the zone of interests protected" by the Incompatibility clause, as we show pp. 14-15, *infra,* then standing exists, however, "general" or widely shared the interests, pp. 11-13, *supra.*

citizens (these respondents) have an interest in Congress' consideration of military measures. Pet. App. C 42, 45-46. The more than 100 members of Congress who hold Armed Forces reserve commissions are in precisely the position of potential conflict of interest that the Incompatibility clause was intended to prevent, and indeed instances of actual conflict have been common. Resp. App. A-E. Respondents, as citizens who desire to advocate to the Congress views on military measures, have an "interest . . . within the zone of interests to be protected" by the Incompatibility clause, and the "logical nexus" between this status and the clause is similarly established.

4. The District Court remarked in its discussion of standing as citizens that "it is not irrelevant to note that if these plaintiffs cannot obtain judicial review of defendants' action, then as practical matter no one can." Pet. App. B 31. Petitioners make much of this phrase and call it "revolutionary in its implications." Br. 19. This Court has held, however, that the standing requirement "does not insulate executive action from judicial review, nor does it prevent any public interests from being protected through the judicial process." *Sierra Club* v. *Morton, supra,* 405 U.S. at 740. To find that the status of citizen is as capable of conferring standing to protect public interests through the judicial process as the status of taxpayer, *Flast, supra,* or the status of user of air and water or admirer of natural beauy, *S.C.R.A.P., supra, ADAPSO, supra,* 397 U.S. at 154, is hardly "revolutionary." More particularly it is not revolutionary in this case, given the specificity and narrow scope of the Constitutional provision involved here and the

precise nature of the injury alleged, see pp. 11-13, *supra*.[5]

These considerations show the inapplicability of petitioners' authorities. Thus Mr. Levitt, *Ex Parte Levitt*, 302 U.S. 633, did not claim that any interest of his could in any way have been harmed by Justice Black's taking his seat. His only interest was as a member of this Court's bar; he did not assert that Justice Black's alleged ineligibility could in any way deprive Levitt of the unbiased consideration by the Court of anything.[6]

Mrs. Frothingham in *Frothingham* v. *Mellon*, 262 U.S. 447, argued that various Federal programs exceeded the power of Congress because they infringed on the residuary grant of power to the states in the

---

[5] Moreover, in determining whether the litigant before them has standing, courts have frequently considered whether anyone else has a greater stake and would be likely to challenge the governmental acts in issue. See Linda R.S. v. Richard D., 410 U.S. 614, 619 n.5, p. 17, *infra*. This point is especially significant when—as here—the right sought to be protected is a publicly important one. See, e.g., Nat'l Association of Securities Dealers v. SEC, 420 F.2d 83, 99, 100 (D.C. Cir. 1969), aff'd sub nom. Investment Company Institute v. Camp, 401 U.S. 617 (see also concurrence of Burger, J., 420 F.2d at 108); Curran v. Laird, 480 F.2d 122, 139-140 (D.C. Cir. 1969) (en banc) (concurring and dissenting opinion); Scanwell Laboratories v. Schaffer, 424 F.2d 859, 870 (D.C. Cir. 1970). Implicit acceptance of this principle can be seen in a number of cases decided by this Court, as well. See, *e.g.*, School District of Abington Township v. Schempp, 374 U.S. 203; Engel v. Vitale, 370 U.S. 421; Everson v. Board of Education, 330 U.S. 1; Wilson v. Shaw, 204 U.S. 24; Millard v. Roberts, 202 U.S. 520; Bradfield v. Roberts, 175 U.S. 291. See also United States v. S.C.R.A.P., — U.S. —, 93 S. Ct. 2405, 2417 n.14.

[6] The proceeding was not a lawsuit by a citizen, as petitioners mistakenly assert, Br. 14., but a motion to this Court in its original jurisdiction filed by a member of this Court's bar.

10th Amendment and exceeded the general powers of Article I, § 8. *Flast* v. *Cohen, supra,* 392 U.S. at 105. Thus she did not allege—as this Court pointed out in *Flast, ibid.,* "a breach . . . of . . . specific constitutional limitations."

Mrs. Frothingham also lacked standing because she was asserting not her own but another party's interest, "the State's interest," *Flast, supra,* 392 U.S. at 105, the same infirmity that deprived plaintiffs of standing in *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, where a non-member of the lodge had no standing to assert the interest of members, *i.e.,* to "seek redress for injuries done to others," 407 U.S. at 166, and in *Laird* v. *Tatum,* 408 U.S. 1, where plaintiffs who admitted that they themselves had suffered no harm from Army surveillance practices were denied standing to raise the chilling effect of such practices on nameless "millions" of others, 408 U.S. at 13-14, n.7 (quoting *Irvis*).

Finally, *Linda R. S.* v. *Richard D.,* 410 U.S. 614, confirms the soundness of the principle underlying the statement of the District Court that petitioners call "revolutionary." There the plaintiff was denied standing because, *inter alia,* there were other parties with a better right to raise the issue, so that denial of standing in *Linda* would not "prevent any public interests from being protected through the judicial process." 410 U.S. at 619 n.5, quoting *Sierra Club* v. *Morton, supra.*[7]

---

[7] Contrary to petitioners' assertions, there are not "many constitutional provisions which, for one reason or another cannot be vindicated in the courts." (Br. 18-19, n.6 The cases cited in support were premised on rationales having no relevance here, and related to very different factual situations. In Kentucky v. Dennison,

5. A major portion of petitioners' standing argument (Br. 25-29) is devoted to a sermon on the need for and utility of the vigorous adversary presentation of important constitutional issues that is guaranteed by litigants' "personal stake in the outcome of this controversy." Respondents have no quarrel with the premise. We suggest, however, that citizens frustrated in their efforts effectively to petition the Congress, as here, have at least as much "personal stake" as that which this Court found gave standing to a citizen who objected to the dilution of his vote in *Baker* v. *Carr, supra,* and to a citizen who objected to diversion to religious schools of a portion of the Treasury to which his taxes contributed in *Flast* v. *Cohen, supra.*

---

24 How. 66, the Court ruled that neither the Constitution nor the Act enforcing the provision in question provided the means to compel execution of the constitutional duty. The Court's reluctance to provide a constitutional remedy does not reflect the modern trend. See, *e.g.*, Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388; W. Dellinger, *The Constitution as a Sword,* 85 HARV. L. REV. 1532 (1972); A. Hill, *Constitutional Remedies,* 67 COLUM. L. REV. 1109 (1967). *Mississippi* v. *Johnson,* 4 Wall. 475, held that no action could lie to restrain the President from performing the political and discretionary duties involved in administering the Reconstruction Acts. In Pacific Telephone Co. v. Oregon, 223 U.S. 118, the Court followed the well settled principle that the enforcement of Article IV, section 4 belonged only to Congress by its very wording, and because of its unique political character. The Court noted that plaintiffs were not "testing some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limit, but were [suing Oregon] to demand of the state that it establish its right to exist as a state republican in form." 223 U.S. 150-51. Not surprisingly, the Court held that determination of whether a state had a republican form of government was a "purely political" question, which only Congress could resolve. Further with respect to the guarantee clause and Luther v. Borden, 7 How. 1, see Berger, Impeachment, The Constitutional Problems 107-08 (1973).

These decisions were reached over the strong, scholarly and carefully argued dissents of Justices Harlan and Frankfurter, *Baker, supra,* 369 U.S. at 266, 330; *Flast, supra,* 392 U.S. at 116. Petitioners echo the arguments that these great Justices made, but which have been rejected by this Court in those decisions and in the decisions that have followed.

Petitioner also raises the specter of a flood of litigation (Br. 27). Suffice it to say, with knowledgeable Courts of Appeals, that this specter has yet to materialize and perhaps should now be laid to rest. *Scanwell Laboratories* v. *Shaffer,* 424 F.2d 859, 872-73 (D.C. Cir. 1970); *Scenic Hudson Preservation Conference* v. *FPC,* 354 F.2d 608, 617 (2d Cir. 1965); see Davis, *The Liberalized Law of Standing,* 37 U. CHI. L. REV. 450, 468-71 (1970). As the *Scanwell* court noted, 424 F.2d at 872, courts have ample tools and power to avert frivolous lawsuits.

B. Standing as Taxpayers

Petitioners assert that respondents do not have standing as taxpayers under *Flast* v. *Cohen, supra,* arguing that Congress' support of its members in the reserves is not an exercise of the taxing and spending power and that the Incompatibility clause is not a restriction on the exercise of the taxing and spending power—the two criteria set out in *Flast.* Br. 22-23.

Article I, § 8 reads:

> The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and *provide for the common Defence* and *general Welfare* of the United States. . . . (emphasis added)

In *Flast* a taxpayer challenged an expenditure of tax funds "for the . . . general welfare" under Article I, § 8, to support education in religious schools. 392 U.S. at 87. Here respondents challenge an expenditure of tax funds "for the common defence".[8] The relevant appropriations acts make it plain that support of the Armed Forces reserves, including their Congressmen-members, is an exercise of the Article I, § 8, taxing and spending power for "the common defense."

Public Law 92-156, 92d Cong., 1st Sess. (1971) appropriates funds for military procurement and in Title III provides for the authorized strength of the reserves. This was a bill providing for the common defense:

> *Defense and priorities*
>
> As the Nation debates its many serious domestic needs in an atmosphere of weariness with the war in Vietnam, it is important to remember that a superior defense capability is and must remain our No. 1 national priority. Deterrence of nuclear war, control of the seas, and the power to carry out those overseas obligations essential to collective security are fundamental to our existence as a nation. Without the capability to perform these

---

[8] The debate about whether the Article I, § 8 power to tax and spend "for the common defence and general welfare" was limited to taxation and expenditure for the enumerated purposes immediately following, as asserted by Madison, or transcended the enumerated powers, as asserted by Hamilton, has been settled in favor of Hamilton. United States v. Butler, 297 U.S. 1, 65-66; Corwin, The Spending Power of Congress—Apropos the Maternity Act, 36 HARV. L. REV. 548 (1923). See also United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 681:

> Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defence and general welfare.

> missions and the security it brings, domestic progress would not be possible. Reasonable men may differ about what specific sizes and capabilities of military forces are necessary for national security. But given the long leadtimes required to develop modern weapons, the growing capabilities of our potential adversaries, and the high degree of uncertainty in today's world, it is clear that we must plan for more defense than that which is barely enough.
>
> It is also extremely important that, given the other burdens borne by the Federal taxpayer, the Department of Defense be authorized no more funds than will prudently be needed to maintain an adequate national security. Having in mind also the importance of the economy, the committee recommends authorizing a total of $21.018 billion which is a 5.3 percent reduction in the total request.

S. Rep. No. 92-359, 92d Cong., 1st Sess. (1971) at 15; see *id.* at 113-118. To the same effect, at greater length, see H.R. Rep. No. 92-232, 92d Cong., 1st Sess. (1971) at 8 *et seq.*

Public Law 92-145, 92d Cong., 1st Sess. (1971) appropriated funds for the acquisition and construction of military installations, including reserve force facilities (Title VII). Its defense purposes were broad. H.R. Rep. No. 92-362, 92d Cong., 1st Sess. (1971), at 3 ("Troop Housing"); 5 (appropriations "for the improvement and modernization of the Vietnamese Armed Forces"); 7 ("Pollution Abatement"), 10 ("improvement of the crosswind runway at Keflavik [Iceland] Airport"); 40 ("Defense Atomic Support Agency;" "Defense Supply Agency"); 42 ("Family Housing"); 49 ("Homeowners Assistance"). See especially *id.* at 53, listing appropriations for "Reserve

Forces Facilities", including "armory-type facilities . . . air pollution control facilities . . . water pollution control and personnel support facilities."

The 1972 appropriations were similar:

P.L. 92-545, 92d Cong., 2d Sess. (1972) [authorization of funds for construction and development of reserve force facilities (Title VIII)]; P.L. 92-547, 92d Cong., 2d Sess. (1972) [appropriation of funds for the acquisition, construction, rehabilitation and conversion of military installations, including reserve facilities]; P.L. 92-570, 92d Cong., 2d Sess. (1972) [appropriations of funds for pay, allowances, clothing, subsistence, travel and related expenses for military personnel, including the reserves (Title I); retirement pay for military personnel including reserves (Title II); for the operation and maintenance of the armed forces, including the reserves (Title III)].

These are expenditures made for the common defense under the taxing and spending clause and satisfy the first prong of the dual *Flast* test.

Respondents also satisfy the second *Flast* prong, for the Incompatibility clause was expressly intended by the Framers as a check on the exercise of the taxing and spending power. It was an explicit purpose of the Framers to prevent the executive branch from holding out the prospect of lucrative office in order to exercise influence over the Congress—in short, to prevent the purchase of Congressional support by expenditure of appropriated tax funds.

The Framers devised the Incompatibility Clause (See, Pet. App. B. 20-22) as a way of nipping in the bud the "venality and corruption" seen to be rife in

England because of the crown's preferment of members of Parliament to office. Pet. App. B 20. The matter was taken up at the Convention on August 14, 1787. Charles C. Pinkney had argued that the executive should not be deprived of the talents of members of Congress but proposed that they be allowed to serve in the executive without compensation. 2 Farrand, *The Records of the Federal Convention of 1787*, 283-4 (1911). George Mason then

> ironically proposed to strike out the whole section, as a more effectual expedient for encouraging that exotic corruption which might not otherwise thrive so well in the American Soil—for compleating that Aristocracy which was probably in the contemplation of some among us and for inviting into the Legislative service, those generous & benevolent characters who will do justice to each other's merit, by carving out offices & rewards for it. In the present state of American morals & manners, few friends it may be thought will be lost to the plan, by (the opportunity) of giving premiums to a mercenary & depraved ambition.

Id. at 284.

Then Elbridge Gerry remarked (referring particularly to ambassadors):

> If they are once appointed, the House of Reps. will be obliged to provide salaries for them, whether they approve of the measures or not. If men will not serve in the Legislature without a prospect of such offices, our situation is deplorable indeed. If our best Citizens are actuated by such mercenary views, we had better chuse a single despot at once. It will be more easy to satisfy the rapacity of one than of many. According to the idea of one Gentleman (Mr. Mercer) our Government it seems is to be a Govt. of plunder. In that case it certainly

would be prudent to have but one rather than many to be employed in it.

Id. at 285.

Roger Sherman remarked that "the Constitution should lay as few temptations as possible in the way of those in power." *Id.* at 287. To James Wilson's objection that the clause would discourage men of talent from entering public service, Oliver Elsworth "did not think that the mere postponement of the reward [until after the member leaves the Congress] would be any material discouragement of merit." *Id.* at 288. John Randolph of Roanoke was "opposed to the striking out of the clause; as opening a door for influence & corruption." *Id.* at 290. The matter was then postponed to September 3.

On that day, Pinkney again raised his earlier amendment to make members "incapable of holding any office under the United States for which they or any other for their benefit, receive any salary, fees or emoluments. . . ." *Id.* at 489. Again Randolph "was inflexibly fixed against inviting men into the Legislature by the prospect of being appointed to offices." Mason again insisted that "ineligibility will keep out corruption, by excluding office-hunters." *Id.* at 491. The clause was then adopted in its present form. *Id.* at 492.[9]

---

[9] Congressmen-reservists presently draw no pay and it may be that retirement benefits are not munificent. But petitioners could and might return Congressmen-reservists to pay status, Jt. App. 7, 21-23; see p. 40, infra. As noted, respondents were denied discovery to show what perquisites, like travel junkets disguised as "training", use of military aircraft and the like may be showered on reservist-members who happen to sit on key committees. See Pet. App. B 26-27; Jt. App. 5-6, ¶¶ 17-19.

Thus—as with the Establishment clause—the concern of the framers with Article I, § 6 was "quite clearly that" the independence of the legislature "ultimately would be the victim if" the executive could dangle salaried offices supported by the "taxing and spending powers" before individual members. Article I, § 6 "was designed as a specific bulwark against such potential abuses . . . and . . . operates as a specific constitutional limitation upon" such expenditures. *Cf. Flast* v. *Cohen*, 392 U.S. at 103-104.[10]

Respondents have standing as taxpayers.

II. THE CASE IS JUSTICIABLE

Petitioners argue (Br. 29-42) that this case does not present a justiciable controversy, asserting that the constitutional provision that the District Court and Court of Appeals ordered enforced, the Incompatibility clause, may be enforced exclusively by the Congress. The argument is that there is "a textually demonstrable commitment of this issue" to Congress. *Baker* v. *Carr, supra*, 369 U.S. at 217. It is bottomed on the premise that the clause establishes a qualification for membership in Congress exactly like those of age, citizenship, inhabitancy within the constituency on election day and popular election, of which only

[10] The *Flast* reasoning is peculiarly apt here:

> The concern of Madison and his supporter was quite clearly that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general. The Establishment Clause was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.

Congress may be the judge under Article I, § 5. Br. 31-42. Petitioners note that this Court has expressly avoided this question. Br. 32. *Powell* v. *McCormack*, 395 U.S. 486, 421 n. 41.

A. The Incompatibility Clause Does Not Establish a "Qualification."

There are, of course, fairly obvious important differences between the qualifications of age, citizenship and inhabitancy, or that a Senator be elected by the people, on the one hand, and holding incompatible offices on the other. The former are absolute qualifications, based on pre-existing, unchangeable facts. A member cannot change his age or turn an appointment to the Senate by the legislature (which the XVII Amendment abolished) into election by the people. The disability declared by the Incompatibility clause, on the other hand, may be removed by the member. He has a choice between the executive office and the Congressional seat, and if he gives up his office, he becomes entitled to take his seat.

The constitutional qualifications serve very different purposes from the Incompatibility clause. The qualifications serve to assure maturity, commitment to the nation as such and attachment to local interests. They were intended to be minimal, broadly inclusionary qualifications, opening membership in the Congress to all, particularly without regard to wealth or property. See *Powell* v. *McCormack, supra,* 395 U.S. at 532-34. The Incompatibility clause, on the other hand, had a very specific exclusionary purpose—to avoid "the danger of executive influence upon the legislative body." *The Federalist,* No. 76 (Hamilton); see Pet. App. B 20-22.

Moreover, quite unlike the objective qualifications of age, citizenship, inhabitancy and popular election, the removal of the disability created by holding an incompatible office is not only within the control of the member himself but also within the control of the executive. There must be executive action or refusal to act for an incompatibility to be established or maintained. Indeed, it is precisely this characteristic that makes violation of the Incompatibility clause justiciable. A court cannot remedy the want of age or declare that a popular election has taken place when it has not. But a court can remove incompatibility by ordering the executive to discharge the member from his office. Thus, as we shall now see, this case is presented "in a form historically viewed as capable of judicial resolution," *Flast* v. *Cohen, supra,* 392 U.S. at 101; *ADAPSO, supra,* 397 U.S. at 151-52.

B. The Incompatibility Clause Reaches the Office as Well as the Seat

To do no more than assert, as petitioners do, that the Incompatibility clause establishes a "qualification" for a seat in Congress, and that only Congress may judge whether a member is or is not so qualified to take his seat, does not answer the question posed in this lawsuit. That question is whether the Incompatibility clause works both ways, and establishes a rule of law, which a court may enforce, that a person may not continue to hold an office after he becomes a member of Congress.

The long line of Congressional precedents petitioners cite (Br. 36-42) does not answer this question. The precedents show simply that Congress has considered the Incompatibility clause as empowering the Congress

to refuse a member his seat. Nowhere do these precedents say or suggest that Congress felt that its jurisdiction, or the remedy of exclusion, were exclusive. As we shall see, precisely because the clause is not merely a qualification but is equally directed at and intended to require divestment of executive office, jurisdiction of the Congress is *not* exclusive.

Petitioners rely on the form of the clause—"no person holding any Office . . . shall be a member of either House . . . ." as showing its one-way reach, and assert that the clause is directed at the holding of a seat in Congress, rather than the holding of Executive office. Br. 31-32. The District Court found that the debates showed that the clause was intended to establish the incompatibility of the two offices and to reach in either direction. Pet. App. B 20-22, 32-34. The District Court's analysis of the debates disposes of petitioners' argument, made below and repeated here (Br. 33-36), that the change in the language of the clause during the debates was intended to aim the Incompatibility clause in only one direction. As characterized in a recent comment, Note, 85 HARV. L. REV. 507 (1971), the District Court found that "the delicate matter of the infringement of the prerogatives of Congress . . . was simply not posed by the nature of the remedy sought," *id.* at 509, and this is more persuasive than the petitioners' "overly refined textual analysis," *id.* at 508.

1. The purpose of the clause

The purpose of the Incompatibility clause was to ensure the separation of the executive and legislative branches. The point was to prevent domination

of the legislature by the executive. See 1 Farrand, *The Records of the Federal Convention of 1787,* at 375-377, 386, 391-394 (1911); 2 *id.,* at 283-289, 490-491; 3 *id.,* at 200-201; *The Federalist,* No. 76 (Hamilton). Military influence was especially feared. H.R. Rep. No. 2205, 55th Cong., 3d Sess., *Appointment of Members of Congress to Military and Other Offices,* Part I at 60-62 (1899). See 1 Hinds, *Precedents of the House of Representatives* ¶ 494 (1907); H.R. Rep. No. 885, *Right of a Representative in Congress to Hold a Commission in the National Guard,* 64th Cong., 1st Sess. (1916) at 4-6; 2 Farrand, *supra,* at 283-289; 3 *id.* at 200-201. The purpose is obviously equally well served and the incompatibility eliminated whether the one office or the other is vacated. See 1 Farrand, *supra,* at 20, 218, 375-377, 379-381, 391-394; 2 *id.* at 284-291; 3 *id.* at 200-201; *cf.* Bartlett, *Cases of Contested Election in Congress, 1834-1865* (1865) at 92-94, 395; H.R. Rep. No. 885, *supra,* at 4-5.

Hence the Incompatibility clause operates as a restraint on both the Executive and Legislative; both are under an equal obligation to obey and enforce its provisions. See Madison, *Notes of Debates in the Federal Constitution of 1787,* 450-457 (1966 ed.); 1 Farrand, *supra,* at 381-382, 391-394; 2 *id.* at 287, 490-491; 3 *id.* at 200-201; H.R. Rep. No. 885, *supra.* If anything, the remedy of removal from office, not from the Congress, is to be preferred. As the House found in 1899,

> It is evident that it was the policy of the framers of our Constitution to prohibit Senators and Representatives in Congress *while remaining such from holding any other office* under the United States, and no plainer language to declare the pur-

> pose could have been used than the words of the Constitution, viz: "No person holding any office under the United States shall be a member of either House during his continuance in office."

H.R. Rep. No. 2205, *supra,* Part I at 60 (emphasis added).

2. "Acceptance of the second office vacates the first"

The Congressmen-reservists whose offices are in question here accepted membership in Congress after having joined the reserve. "Acceptance of the second office vacates the first," and the Incompatibility clause reaches and requires removal from the first, reserve, office. Pet. App. B 33.

This is confirmed by the report of the House Committee on Elections in the case of Frank P. Blair, Jr., and Robert C. Schenck, H.R. Rep. No. 110, 38th Cong., 1st Sess. (1864). Both Blair and Schenck held volunteer commissions at the time they were elected to the House. Schenck resigned his commission and took his seat; Blair chose to give up his seat and command an army corps. H.R. Rep. No. 2205, *supra,* at 42 (1899). But the Committee's discussion is illuminating. First it asked the question:

> 1st. Can the two offices of representative in Congress and major general of volunteers be held by the same person at the same time?

H.R. Rep. No. 110, *supra,* at 4.

It then dealt with the meaning of incompatibility:

> The duties of the two offices are so entirely incompatible, that this of itself, were there no other obstacle, would render their discharge by the same person an impossibility. The representative is elected by the *people,* and represents them in the

> House, discharging the duties they require of him under the Constitution; the major general is appointed by the *President,* by and with the advice and consent of the Senate, and is required to *obey* him as commander-in-chief, and "no man can serve two masters."

Ibid. (emphasis in original)

Moreover

> The attempt to invest the same person with two offices—one legislative and the other executive—and require of him at the same time the discharge of the duties of both, is, whether they be conflicting or not, a commingling of the duties of the executive and legislative departments. It is bringing the Executive himself into the very halls of Congress, and if persisted in, might ultimately prove as pernicious as if he had a seat therein, and as many votes as he had commissions.

Id. at 5.

The committee turned next to the issue of the two-way thrust of the Incompatibility clause:

> The next question arising in this case is, What effect does the acceptance and discharge of the duties of the one office have upon the tenure of the other? So far as congressional action is concerned, this question has been answered in the answer already given to the one of incompatibility. *The acceptance and discharge of the duties of any such office vacates any incompatible office at that time held* .... A man is not held incompetent to accept and enter upon the duties of any such office while holding one whose duties are incompatible; but his so doing is treated and held to be a resignation or vacating of any such office.

Id. at 6-7 (emphasis added).

Of course, "the mere appointment or election to an office, the duties of which are incompatible with those of one already held, will not vacate such office" as long as it is "unaccompanied with consent or acceptance." Then, quoting ancient English case-law, the Committee concluded "The appointment of a person to a second office incompatible with the first is not absolutely void, but on his subsequently *accepting* the appointment and *qualifying,* the first office is *ipso facto* vacated." *Id.* at 7-8 (emphasis in original).

Finally the Committee was

> of opinion that the reasons in which this constitutional provision originated, as well as its express language and the practice of the House under it, are in harmony with the rule of law which existed before the formation of the Constitution, that the acceptance and entering upon the discharge of the duties of an office, which, from the nature of its duties, or from express legal or constitutional prohibition, is incompatible with another previously held, *vacated the former office from the time of such acceptance* and entering upon the duties assigned to the latter office.
>
> And, consequently, *when a person elected to Congress accepts that office,* or qualifies and enters upon the discharge of its duties, *he vacates or forfeits any office he may then hold under the United States.* And when any member of Congress, after he has qualified or entered upon the discharge of his duties as such member, accepts or enters upon the discharge of the duties of "any office under the United States," he *ipso facto,* vacates or forfeits his seat as a member of Congress.

Id. at 9 (emphasis added).

The matter was finally resolved by a joint resolution of both House and Senate, adopted after an attempt to

evade the clause by permitting Blair to resign temporarily from Congress was defeated:

> Resolved, That *an officer of the United States* whose resignation has been duly accepted and taken effect, or *who, having been elected a member of either House of Congress, qualifies and enters on the discharge of the duties of a Member, is thereby,* in either case, *out of the office previously held,* and can not be restored to it without a new appointment in the manner provided by the Constitution.

1 Hinds, *Precedents of the House of Representatives,* ¶492 at 603 (1907) (emphasis added).

In short, as the Congress ruled, the incompatibility is to be eliminated by vacation of the earlier office; indeed (as we have noted, p. 29 *supra*) membership in Congress is to be preferred if possible and the executive office vacated.

C. The Incompatibility Clause Imposes a Judicially Enforceable Duty Upon Petitioners

1. The right to sit in Congress is not an issue in this case

The issue in this case is whether agencies of the United States, executive branch officials, the Secretary of Defense and the service Secretaries, may maintain members of Congress in such an office in the face of the Incompatibility clause. Very simply, it is whether the petitioners are bound to obey, or as they assert may disregard, this provision of the Constitution.

The issue here is not nor did the lower courts here decide "whether members of Congress who hold reserve

commissions are barred from serving as 'a member of either House' ", Br. 42. The District Court held that

> it is clear that defendants, as the superiors of Reserve officers within the Executive branch, have the right and the power to remove Congressmen from the Reserve offices they held at the time of their election, and that their failure to do so is subject to judicial review.

Pet. App B 33-34.

Thus the question in this case is not the existence of a "textually demonstrable commitment" to the Congress of the power to judge the qualifications and right to be seated of an elected member of Congress, *cf. Powell* v. *McCormack*, 395 U.S. 486. The question here is one of petitioners' duty to remove members of Congress from the Reserves if holding reserve membership is found to violate the Incompatibility clause. There certainly is no "commitment" of that question either to Congress or to the Executive branch. It is justiciable.

2. The incompatibility clause imposes a duty upon petitioners

The judgments below are based on the proposition that where the Constitution establishes a rule, the rule applies to all officers of government whose acts may be involved in or (as here) necessary to a violation of the rule. The proposition seems simple and uncontrovertible. Petitioners take an oath to support and obey the Constitution. Not only the courts, but "other departments, are bound by" the Constitution. *Marbury* v. *Madison*, 1 Cranch 137, 180. Since Chief Justice Marshall wrote this dictum, suggestions that an executive officer or administrative agency is not bound by the Constitution have been made so rarely that judicial

restatements of the basic rule are hard to find. But it has been held that the obligation imposed on the President (and hence on his executive branch subordinates) includes the duty to take care that the Constitution and "the rights, duties and obligations growing out of the Constitution" are enforced. *In re Neagle,* 135 U.S. 1, 63-64. "The prohibitions of the Constitution were designed to apply to all branches of the National Government. . . ." *Reid* v. *Covert,* 354 U.S. 1, 17. As Judge Prettyman has declared:

> Action of Government officials in violation of the Constitution is void . . . . A basic and inherent function of the judicial branch of a government built upon a constitution is to set aside void action by government officials, and so to restrict executive action to the confines of the constitution. In our jurisprudence, no Government action which is void under the Constitution is exempt from judicial power.

Eisentrager v. *Forrestal,* 174 F.2d 961, 964 (D.C. Cir. 1949) rev'd on other grounds, 339 U.S. 763 [footnotes omitted].

Equally apt are the words of the Florida Supreme Court over half a century ago:

> The Constitution of the United States, within its limited sphere, is the supreme law of the land; and it is the duty of all officials, whether legislative, judicial, executive, administrative or ministerial, to so perform every official act as not to violate the constitutional provisions.

Montgomery v. *State,* 55 Fla. 97, 45 So. 879, 881 (1908).

In short, the heads of executive departments are subject to suit for and may be judicially restrained from

performing acts in violation of the Constitution. *See, e.g., Flast* v. *Cohen,* 392 U.S. 83. After all,

> *it is the province and duty of the judicial department to determine* in cases regularly brought before them, *whether the powers of any branch of the government,* and even those of the legislature in the enactment of laws, *have been exercised in conformity to the Constitution;* and if they have not, to treat their acts as null and void.

Kilbourn v. *Thompson,* 102 U.S. 168, 199, quoted with approval in *Powell* v. *McCormack,* 395 U.S. 486, 506 (emphasis added).

The Court has lately repeated this rule.

> Deciding whether a matter has in any measure been committed by the constitution to another branch of government, *or whether the action of that branch exceeds whatever authority has been committed,* is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Baker v. *Carr,* 369 U.S. 186, 211 (emphasis added).

III. RESERVE MEMBERSHIP IS AN OFFICE WITHIN THE MEANING OF THE INCOMPATIBILITY CLAUSE

After devoting most of their brief (Br. 10-42) to threshold or door-closing arguments, petitioners finally turn to the question whether reserve membership is an "office" proscribed by the Incompatibility clause (Br. 43-40). Their argument is threefold: first, that the clause was not intended to reach this kind of office because it does not pose the dangers anticipated by the Framers (Br. 44-52); second, that a reserve com-

mission is not an "office" anyway because, petitioners assert, the Court of Claims held so in *Simmons* v. *United States,* 55 Ct. Cl. 56 (1920) (Br. 52-54) and because 5 U.S.C. § 2105(d) so provides by statute (Br. 54-57).

A. The Incompatibility Clause Reaches Reserve Office

Respondents, petitioners and the lower courts agree that the purpose of the Incompatibility clause was to eliminate a source of Executive branch influence on the legislative branch. Br. 44-48; pp. 23-25, 28-30, *supra;* Pet. App. B 20-22. Petitioners would doubtless concede that full time military service would be an "office" barred by the Incompatibility clause. They assert, however, that somehow a reserve commission is different.

1. In 1916, in a report unusual for its scholarship, documentation and careful analysis of historical precedents, the House Judiciary Committee concluded that a commission in the National Guard was an "office" within the constitutional prohibition. H.R. Rep. No. 885, 64th Cong., 1st Sess. (1916), *Right of a Representative in Congress to Hold Commission in National Guard.* The committee based its conclusion on a full analysis of the act of Congress creating the National Guard, discussion of many Congressional precedents and applied the definition of "office" given in *United States* v. *Hartwell,* 6 Wall. 385, 393 (1867), as involving "tenure, duration, emoluments and duties." Br. 53 n. 30.

The earliest case, that of John P. Van Ness, Clarke and Hall, *Cases of Contested Elections in Congress, 1789-1834* at 122 (1834), in fact involved an appoint-

ment to the District of Columbia militia—not the regular forces—in 1803: peacetime. Van Ness was expelled from Congress for accepting the 1803 equivalent of a Reserve commission.

The Committee also relied on the case of Representative Edward Baker. Bartlett, *Cases of Contested Elections in Congress, 1834-1865* at 92 (1865). Quoting from the earlier report and applying it to National Guard membership, the 1916 Committee wrote:

> The Constitution intended that the President should have no power to control the action of Congress in any respect; that it should be perfectly independent. Now, suppose that every Member of Congress were a colonel in the Army in the service of the United States, and the President, who is by the Constitution the Commander in Chief of that Army, should come into the Hall of Congress and order each individual Member to retire immediately, under the penalties inflicted for disobedience to orders, to his post in the Army, what would become of Congress? If it be urged that in the performance of his duties as an officer of the militia, only a small portion of his time will be necessary to perform the duties imposed upon him by reason of the office, yet his oath of office requires him to yield obedience to the orders of the President of the United States as Commander in Chief at all times. Thus, he is subject to the orders that may be issued by the Executive and can not, therefore, be an independent Member of the House of Representatives in Congress, as the Constitution of the United States provides he shall be. In other words, there can be no divided allegiance.

H.R. Rep. No. 885, *supra*, at 5.

The 1916 Report relied heavily on an 1899 Report, H.R. Rep. No. 2205, 55th Cong., 3d Sess., p. 29, *supra*. Quoting that report, the 1916 House Committee reiterated the purpose of the Incompatibility clause:

> The framers of the Constitution intended to keep the legislative, judicial, and executive branches of our Government separate and distinct; to prevent Cabinet officers from being Members of Congress, and thereby giving undue power to the President and his immediate advisers; to prevent the centralization of power and office-holding power in a few hands; to prevent judges from acting at the same time as legislators and thus concentrating power in the courts; to avoid the manifold dangers to the existence and perpetuity of our free institutions and a representative government that would follow a concentration of the legislative and judicial or the legislative and executive (the military and naval power being a branch of the executive) in a few and the same hands.
>
> Without this constitutional restraint it would be possible for a President and the Congress to act in collusion; for the Congress to create high military and naval positions without limit and for the President to fill these offices from the ranks of unscrupulous, unpatriotic and ambitious Senators and Representatives in Congress (the Senate confirming, of course), and as the President is Commander in Chief of the Army and Navy, to thus concentrate all power in the hands of the executive branch of the Government. These military legislators might increase the Army, control the elections by the bayonet, and government by the people and for the people would end. Two printed lines in the Constitution of the United States has made all this impossible.

H.R. Rep. No. 885, *supra*, at 6; H.R. Rep. No. 2205, *supra*, at 60.

2. The District Court, relying on these precedents, concluded that "A commission in the modern armed forces reserve cannot fairly be distinguished from a commission in the 1916 National Guard for purposes of" the Incompatibility clause. Pet. App. B 24. Petitioners argue that there is a difference, at least as to Congressmen-reservists, whose pay, benefits, promotion and duties for the present are limited by recent regulations defendants have issued. But the District Court found (Pet. App. B 24, fn. *)

—that reservists "are subject to call and assignment by the President." Petitioners do not dispute this.

—that reservists' "salaries and expenses are paid from federal funds." While Congressmen-reservists presently are not eligible for salaries, this (like the other restrictions on Congressmen's duties, benefits, retirement and promotion as reservists) is by petitioners' own administrative decision, which they may change at any time. See Resp. App. D; Jt. App. 7, ¶¶ 21-33; DOD Directives 1235.9 (September 13, 1967), 1215.6 (August 25, 1969; as amended June 12, 1971); 1200.7 (July 2, 1970).[11] Petitioners say that Congressmen may train only "at their own expense," Br. 50, but by this they mean only that Congressmen receive no pay and allowances; Petitioners do not assert that a Congressman-reservist while training does not receive food, quarters and transportation and use equipment at the government's expense.

---

[11] Little reliance may be placed on the immutability of these directives. Petitioners moved to deny promotion credits to Congressmen only *after* the District Court's decisions was announced. DOD Directive 1215.6, June 12, 1971, amendment. We assume that petitioners would oppose any limitation on their authority to resume full training pay, promotion and the like for Congressmen. See, e.g., Jt. App. 7, ¶¶ 21-23.

—that reservists "are subject to the Uniform Code of Military Justice while on duty or while in retired status." Petitioners do not dispute this. 10 U.S.C. § 802.

—that reservists "enlist for definite terms" and "subscribe to the oath of office required of all civil servants." Petitioners do not dispute this.

The characteristics of reserve membership thus satisfy the fourfold test of *United States* v. *Hartwell, supra.* Appointment to a commission creates "tenure." The food, quarters, transportation and other uses of equipment at the expense of the government for a Congressman in training or on other active duty, and his retired pay, are "emoluments." The enlistment "for a definite term" satisfies the requirement of "duration," and being subject to assignment and call and military discipline creates "duties."

More important, even if the four *Hartwell* requirements of "office" were not met, reserve membership has sufficient characteristics of an office to fall within the proscription of the Incompatibility clause—as the House Committee found in 1916 and as the District Court found in 1971. The reason is that the character of even the most restricted kind of reserve participation creates the danger of executive influence upon the legislative branch that the clause was intended to prevent. See the opinion of the District Court, Pet. App. B 26-27, and Note, 85 HARV. L. REV. 507, 513 (1971).

B. The Simmons Case and 5 U.S.C. § 2105(d)

Neither *Simmons* v. *United States, supra,* nor the other decisions cited (Br. 53, 54) touch or were intended even remotely to deal with the definition of

office for purposes of the Incompatibility clause. What may be sound policy with respect to attorneys representing clients or contractors selling to the army cannot reasonably be said to apply to the constitutional issue of separation of powers and the prevention of executive influence upon the legislative branch. *Simmons* itself is of very limited weight even for its own holding; the ruling was made on a motion by a member of the Court of Claims bar and the court noted that "no opinion we could render would be conclusive of the question in other jurisdictions."

Petitioners add nothing to the District Court's dismissal of 5 U.S.C. § 2105(d), Pet. App. B 25, except to argue that this Court should ignore the legislative history of the statute making clear its narrow purpose. H.R. Rep. No. 1884, 71st Cong., 2d Sess. at 2, 3 (1930); 72 Cong. Rec. 11628-29 (1930);[12] 72 Cong. Rec. 11892-93 (1930).[13]

---

[12] MR. LAGUARDIA. This only applies to officers in the reserve and removes the disqualification that now exists and prevents them from practicing before the departments.

MR. COLLINS. It goes further than that.

MR. LAGUARDIA. No. I do not think it does.

MR. STAFFORD. Under the reserve officers' law the reserve officer is understood to be an officer of the Government. Then there is a law which forbids officers of the Government practicing before the departments. There are many reserve officers that are attorneys at law. Why should reserve officers in an active state be deprived of the privilege of practicing before the departments? It is their bread and butter. If you do not give them relief, it will result in the withdrawal of, perhaps, 111,000 reserve officers who are now in the Reserve Officers' Corp of the United States Army.

[13] MR. REED. The Senator from Montana objected when the bill was first reached on the calendar, asking for an explanation. I was necessarily absent and was not to make the explanation. Since then he and I have gone over the report on the bill, and the Senator

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

WILLIAM A. DOBROVIR
ANDRA N. OAKES
2005 L Street, N.W.
Washington, D. C. 20036

Attorneys for Respondents

---

stated in open Senate just before he left the Chamber that he had no further objections.

In a word, this bill meets a decision of the Attorney General to the effect that a reserve officer not on active duty is nevertheless a person holding an office of trust or profit under the United States, and therefore is ineligible, if he is a lawyer, to appear in an argument before the Treasury Department or to argue a tax case. Of course, nobody ever dreamed that a reserve officer should be crippled from pursuing his ordinary peace-time vocation when he was not on active duty; and if the decision were insisted on and applied in parallel cases, it would force the retirement from the Reserve Corps of a large number of valuable, useful officers. Therefore the committee was unanimous in reporting the bill.

APPENDICES

The following appendices collect and summarize materials in the Congressional Record, House and Senate reports and hearings, bills introduced in the Congress and other public materials—particularly the magazine of the Reserve Officers Association. The materials show a number of instances where Congressmen's reserve office has influenced their legislative conduct, the classic form of conflict of interest.*

---

*The following members of the 93d Congress are members of the Reserve Officers Association, which has filed a Brief Amicus Curiae in this case:

Montgomery, Gillespie V.
Carey, Hugh L.
Chappell, Bill, Jr.
Frey, Louis J.
Hogan, Lawrence J.
Maillard, William S.
Murphy, John M.
Pell, Claiborne
Satterfield, David E., III
Spence, Floyd D.
Stratton, Samuel S.
Chamberlain, Charles E.
Dominick, Peter H.
Ichord, Richard H.
Myers, John I.
Bevil, Tom D.F.
Blackburn, Ben. B.
Flynt, John J., Jr.
Hart, Philip A., Jr.
Hunt, John E.
Javits, Jacob K.
Mann, James R.
Moorhead, Carlos J.
Rhodes, John J.
Robinson, James K.
Sebelius, Keith G.
Sikes, Robert F.
Stafford, Robert I.
Williams, Harrison A., Jr.
Wright, James C., Jr.
Zablocki, Clement, J.
Albert, Carl B.
Bray, William G.
Cannon, Howard N.
Goldwater, Barry M.
Nichols, William F.
Sparkman, John J.
Teague, Olin E.
Thurmond J. Strom
Wyman, Louis C.

APPENDIX A

Defeat of the 1965 Reserve Merger Plan

In 1965, Secretary of Defense Robert McNamara attempted to rationalize the armed forces Reserves by means of a proposed merger of the Army Reserve into the National Guard in order to eliminate duplication of Reserve components. McNamara did not seek express Congressional approval for this proposal, deeming that this was a matter within his discretion, requiring only a Congressional appropriation for the merged components.[1] The merger would have resulted in a saving of $150,000,000 by eliminating 150,000 Reserve places that were unnecessary in the Defense Department's war contingency plans.[2]

McNamara's plan was defeated by the extraordinary enactment in the 1966 DOD appropriations act of an amendment making maintenance of the two separate Reserve components mandatory.

The legislative history of the amendment reflects the conflict of interest of Congressmen-Reservists. The Preparedness Investigating Subcommittee began hearings on the proposal on March 1, 1965. The members of the Subcommittee were Sen. Symington (D-Missouri); Sen. Jackson (D-Washington); Sen. Saltonstall (R-Massachusetts); Sen. Smith (R-Maine); Sen. Thurmond (R-South Carolina) and was chaired by Sen. Stennis (D-Mississippi). Only Sen. Thurmond was a Reservist, an Army Major Gen-

---

[1] Senate Preparedness Investigating Subcommittee of the Committee on Armed Services. *Hearings on a Proposal to Realine the Army National Guard and the Army Reserve Forces*, 89th Cong., 1st Sess., pt. 1 at 6 (1965) (hereinafter 1965 Senate Hearings).

[2] At the time of the proposed merger there were 700,000 paid drill spaces allocated to Reserve components, 400,000 in the National Guard and 300,000 in the Army Reserve. War plans provided for 498,500 men from Reserve components.

eral. But Reservists on the full committee were Sen. Cannon (D-Nevada), Brigadier General, USAR; Sen. Inouye (D-Hawaii), Major, USAR; Sen. Miller (R-Iowa), Colonel, USAR; Sen. Tower (R-Texas), Boatswain's Mate, Third, USNR and Sen. Thurmond.

Moreover, Sen. Cannon and three other Reservists—Senators Inouye (Major, USAR), Miller (then Colonel, USAR—now Major General), and Fong (Colonel, USAR) —sat with the Subcommittee during the hearings. When the hearings began, five of the 11 Senators present were high-ranking Reserve officers,[3] and Sen. Cannon joined the Subcommittee after the hearings but before it reported.[4]

During the hearings the Reserve officers-Senators took an active part. They were hostile to the witnesses supporting the merger and friendly to its opponents. For example, General Kaine, USAR (Commanding General, 77th Inf. Div. N.Y.), who spoke against the proposal, was lauded as a "real citizen-soldier." The General was thanked by Senator Thurmond for his testimony:

> "General, on behalf of the subcommittee, we wish to express our deep appreciation to you for coming here today. And I want to commend you for your splendid service in peacetime. We appreciate the splendid service of all of our peacetime soldiers. I was in the Reserve for 36 years and just retired January 1 of this year. And I know how much time the citizen-soldier gives to the service. I think I gave probably a fourth to a third of my time putting the extra hours. And I

---

[3] 1965 Senate Hearings, pt. 1 at 1 (1965).

[4] Senate Preparedness Investigating Subcommittee, *Report on the Personnel, Training Equipment, and Readiness Status of Army Reserve Components*, 89th Cong., 2d Sess., (1966).

especially want to commend you for your able leadership and for the magnificent statement you made today."[5]

In the House, Subcommittee Number Two of the Armed Services Committee had responsibility for this question. One-third of the members of the Subcommittee were Reserve officers: William G. Bray (R-Indiana), Colonel, USAR (Ret.); Robert C. Wilson (R-California), Major, MCR (active); and Alexander Pirnie (R-New York), Colonel, USAR (Ret.).

During the House hearings, Frank E. Weil of the American Veterans' Committee supported the proposed merger. He stated, in response to a question put by Congressman Pirnie—a Reservist—that he felt that it was a conflict of interest for a Congressman to be a Reserve officer:

WEIL: ". . . I would say that some conflict of interest might arise."

PIRNIE: "The oath of a Congressman and the oath of a Reserve are quite similar, aren't they?"

WEIL: "Yes, sir."

PIRNIE: "Could you imagnie anyone up here having a conflict of interest with the security of the United States? Isn't that what we are charged with doing?"

WEIL: "Yes, sir. . . . I could think of Congressman X thinking that his views as a legislator as Congressman X would incline him to go one way, while his views as Lieutenant Colonel X would incline him to go a different way . . . I would like to have his views as Congressman X."

PIRNIE: "Well, wouldn't the witness understand that his views as a Lieutenant Colonel would have very little weight in this Defense Department?"

---

[5] 1965 Senate Hearings.

WEIL: "Yes."

PIRNIE: "Then he is expressing his views as a Congressman, isn't that true?"[6]

The merger was discussed at length on the floors of both Houses. With one exception,[7] the comments were against the proposal. Representative Robert Sikes (D-Florida), for example, spoke against Secretary McNamara's "usurpation" of the power of Congress to regulate the Reserves and argued the desirability of the dual Reserve system.[8] Representative Sikes was and is a Major General, USAR (Ret.) and is a member of the Reserve Officers' Association Hall of Fame.

One of the most vocal and outspoken Congressional opponents of the merger was Hastings Keith (R-Massachusetts), a retired Reserve Army Colonel. Representative Keith, both on the floor and in committee as a witness, openly acknowledged his special interest in the proposal:

> "Mr. Speaker, as a member of Congress who has also been a Reserve officer for 25 years, I have more than the usual amount of interest in Secretary McNamara's proposal realignment of the Army Reserve and National Guard."[9]

In the Subcommittee hearings he declared, "I speak to you as a member of Congress . . . I also speak to you as a member of the Army Reserve."[10]

---

[6] House Subcommittee No. 2 of the Committee on Armed Services, *Hearings on Merger of the Army Reserve Components*, 89th Cong., 1st Sess. at 4445-46 (1965) (hereafter 1965 House Hearings).

[7] 111 Cong. Rec. at 1053 (1965) (Sen. Stephen Young).

[8] *Ibid.*, at 639-41.

[9] 111 Cong. Rec. at 3977 (1965).

[10] 1965 House Hearings at 4219-20.

APPENDIX B

Reservist-Congressmen's Support of the Reserve Officers Association's Legislative Programs

The Reserve Officers Association, which claimed approximately 70,000 members in 1973, has supported numerous bills that favor servicemen in general, and reservists in particular.[1] According to former national president Robert Upp, the Association's

> . . . only reason for being is 'to support a military policy for the United States that will provide adequate national security . . . .'
>
> Under our republican form of government, this can be managed best by the skillful application of the art of legislative advocacy through our nation's elected representatives.[2]

ROA lobbyists like Executive Director Carlton, a former administrative assistant to Senators George Smathers and Walter George,[3] frequently aim their appeals at Reservists-Congressmen, some of whom are also ROA members. (p. 1a, *supra*). These appeals are often successful.

1. The Fight for "Recomputation"

Until 1958, with minor exceptions, retired military pay was increased in step with and at the same rate as active duty pay.[4] In 1958, however, substantial active duty pay raises were not matched by the usual increase in retired pay. In 1963, Congress formally abandoned its practice of recomputing retirement pay on the basis of active duty pay increases; instead, Congress began to adjust retired pay according to increases in the Consumer Price Index.

---

[1] *The Officer*, July, 1973, at 10.

[2] *The Officer*, December, 1972, at 3.

[3] *The Officer*, August, 1971, at 26.

[4] *The Officer*, May, 1968, at 12.

Pre-1958 retirees were given the option of a single recomputation of their retired pay on the basis of 1963 pay schedules.[5]

At that time, R.O.A. seemed satisfied with this arrangement. Senator John Stennis (D-Mississippi) later noted that, "Congress did exactly what it was asked to do by the Reserve Officer's Association and the others. . . ."[6] Recently, however, R.O.A. has tried to persuade Congress to restore the pre-1958 recomputation system.

The effort began in the 91st Congress.[7] Shortly after the 92d Congress convened in February, 1971, R.O.A. announced that, "We have recomputation on the front burner. . . . No one can predict the outcome, but if we lose it, it won't be because the R.O.A. staff hasn't used all the muscle we possess to this end."[8] In April, 1971,

---

[5] 118 *Cong. Rec.* S12,294 (daily ed. July 31, 1972).

[6] *Id.* at S12,293.

[7] Many Reservist-Congressmen introduced recomputation bills during the 91st Congress; none were enacted. Reservist-Congressmen sponsoring recomputation legislation included: Robert Wilson (R-California) (H.R. 387, 91st Cong., 1st Sess. (1969); H.R. 10,764 91st Cong., 1st Sess. (1969)); Robert Sikes (D-Florida) (H.R. 3,116, 91st Cong., 1st Sess. (1969); H.R. 3,327, 91st Cong., 1st Sess. (1969)); John Tunney (D-California) (H.R. 3791, 91st Cong., 1st Sess. (1969); H.R. 3,791, 91st Congress, 1st Sess. (1969); H.R. 4,186, 91st Cong., 1st Sess. (1969); H.R. 5,547, 91st Cong., 1st Sess. (1969); H.R. 5,815, 91st Cong., 1st Sess. (1969); H.R. 6,174, 91st Cong., 1st Sess., (1969)); O. C. Fisher (D-Texas) (H.R. 3,791, 91st Cong., 1st Sess., (1969)); Spark Matsunaga, (D-Hawaii), (H.R. 4,186, 91st Cong., 1st Sess. (1969)); William Nichols, (D-Alabama), (H.R. 5,547, 91st Cong., 1st Sess. (1969)); John Flynt, (D-Georgia), (H.R. 5,815, 91st Cong., 1st Sess. (1969)); Alphonzo Bell (R-California), (H.R. 6,174, 91st Cong., 1st Sess. (1969)); Sam Gibbons (D-Florida), (H.R. 14,371, 91st Cong., 1st Sess. (1969)); Charles Bennett (D-Florida), (H.R. 14,621, 91st Cong., 1st Sess. (1969)); and Fernand St. Germain (D-Rhode Island) (H.R. 19,498, 91st Cong., 2d Sess. (1970)).

[8] *The Officer*, February, 1970, at 26.

R.O.A. endorsed S. 377, the recomputation bill of Reservist-Senator John Tower (R-Texas).[9] Other Reservist-Senators who sponsored the measure included Gordon Allott (R-Colorado); J. Glenn Beall (R-Maryland); W. E. Brock (R-Tennessee); Howard Cannon (D-Nevada); Peter Dominick (R-Colorado); Robert Dole (R-Kansas); Hiram Fong (R-Hawaii); Barry Goldwater (R-Arizona); Edward Gurney (R-Florida); Daniel Inouye (D-Hawaii); Warren Magnuson (D-Washington); Charles Mathias (R-Maryland); Frank Moss (D-Utah); James Pearson (R-Kansas); Hugh Scott (R-Pennsylvania); John Sparkman (D-Alabama); Strom Thurmond (R-South Carolina); John Tunney (D-California); and Claiborne Pell (D-Rhode Island).[10]

In the House, Reservist-Representatives also authored or sponsored recomputation bills. They included: Charles Bennett (D-Florida) (H.R. 522);[11] Ben Blackburn (R-Georgia) (H.R. 608);[12] O. C. Fisher (D-Texas) (H.R. 711);[13] Don Fuqua (D-Florida) (H.R. 724);[14] Spark Matsunaga (D-Hawaii) (H.R. 872);[15] John Flynt (D-Georgia) (H.R. 1,290);[16] Robert Sikes (D-Florida) (H.R. 1,666);[17] Craig Hosmer (R-California) (H.R. 2,308);[18] William Nichols (D-Alabama) (H.R. 2,344);[19] Richard Fulton (D-

---

[9] 92d Cong., 1st Sess. (1971). *The Officer*, April, 1971, at 24.

[10] *CCH Congressional Index—92d Congress.*

[11] 92d Cong., 1st Sess. (1971).

[12] 92d Cong., 1st Sess. (1971).

[13] 92d Cong., 1st Sess. (1971).

[14] 92d Cong., 1st Sess. (1971).

[15] 92d Cong., 1st Sess. (1971).

[16] 92d Cong., 1st Sess. (1971).

[17] 92d Cong., 1st Sess. (1971).

[18] 92d Cong., 1st Sess. (1971).

[19] 92d Cong., 1st Sess. (1971).

Tennessee) (H.R. 5,452);[20] Robert Wilson (R-California) (H.R. 6,197);[21] Alphonzo Bell (R-California) (H.R. 6,509);[22] Sam Gibbons (D-Florida) (H.R. 7,186);[23] William Chappel, Jr. (D-Florida) (H.R. 16,216);[24] and Burt Talcott (R-California) (H.R. 14,643).[25]

None of these bills were enacted, in part because recomputation is enormously expensive. Defense Department cost estimates of some proposals have ranged between ten and twenty-three billion dollars.[26] Nevertheless, Reservist-Senator Vance Hartke (D-Indiana) met with some success when he offered a recomputation amendment to the Military Procurement Authorization for fiscal 1973. Hartke's amendment was strongly supported by Strom Thurmond (R-South Carolina), a Reservist-Senator receiving retired pay.[27] Thurmond, a former R.O.A. President and Minute Man of the Year, enlisted the Association's support:

> Almost incredibly, Senator Thurmond called to report that the amendment to the Military Procurement bill—the amendment emerging under Sen. Vance Hartke's name from the Veterans Committee of the Senate—had a good chance of passage if our people got busy in the grass roots. This was the measure 'everybody' had said would never pass, but on which R.O.A. had never thrown in the towel.

---

[20] 92d Cong., 1st Sess. (1971).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] 92 Cong., 2d Sess. (1972).

[25] *Id.*

[26] *The Officer*, September, 1972, at 4; *The Officer*, May, 1971, at 25.

[27] 118 *Cong. Rec.* S12,395 (daily ed. August 1, 1972).

> Our message went out on a Friday, and over the weekend I [Executive Director Carlton] received several telephone calls from excited but incredulous members. All over the country, our Retirement Committee members burned the wires and the best evidence was that on Tuesday [August 1, 1971] the Senate adopted the Hartke amendment by a vote of 82 to four—a margin sufficiently convincing to permit senators Thurmond, Goldwater and Fong to abstain.[28]

The amendment, nevertheless, died in a House-Senate conference. R.O.A., however, has not "thrown in the towel" on recomputation. The issue survives as one of the goals in the Association's ten-point program.[29] Reservist-Congressmen have re-introduced recomputation measures in the 93rd Congress.[30]

The continuing campaign for recomputation was recently set back by the publication of an unfavorable report by the House Special Subcommittee on Retired Pay Revisions, chaired by Rep. Samuel Stratton (D-New York),

---

[28] *The Officer*, September, 1972, at 5. The three are of course reservists and Senators Goldwater and Thurmond are members of R.O.A.

[29] *The Officer*, January, 1973, at 8.

[30] Reservist-Congressmen who sponsored or introduced recomputation bills in 1973 include Sen. John Tower (R-Texas) (S. 762, 93rd Cong., 1st Sess. (1973); S. 838, 93rd Cong., 1st Sess. (1973)); Sen. Vance Hartke (D-Indiana (S. 762, 93d Cong., 1st Sess. (1973); S. 838, 93d Cong., 1st Sess. (1973)); Sen. Strom Thurmond (R-South Carolina) (S. 762, 93d Cong., 1st Sess. (1973)); Sen. Edward Gurney (R-Florida) (S. 762, 93d Cong., 1st Sess. (1973)); Sen. Frank Moss (D-Utah) (S. 762, 93d Cong., 1st Sess. (1973)); Sen. J. Glenn Beall, Jr. (R-Maryland) (S. 762, 93d Cong., 1st Sess. (1973)); Sen Robert Dole (R-Kansas) (S. 838, 93d Cong., 1st Sess. (1973)); Rep. Charles Bennett (D-Florida) (H.R. 293, 93d Cong., 1st Sess. (1973)); Rep. Spark Matsunaga (D-Hawaii), (H.R. 749, 93d Cong., 1st Sess. (1973)); Rep. Craig Hosmer (R-California), (H.R. 1,565, 93d Cong., 1st Sess. (1973)); Rep. Don Fuqua (D-Florida) (H.R. 5,504, 93d Cong., 1st Sess. (1973)); Rep. Richard Fulton (D-Tennessee) (H.R. 7,466, 93d Cong., 1st Sess. (1973)).

a Captain in the Navy Reserves. The report was strongly criticized in the February 1973 issue of *The Officer*, R.O.A.'s official magazine.[31] Stratton replied in the May *Officer* that while the subcommittee had not recommended recomputation for active duty officers, it had favored consideration of measures to give *Reserve officers* an earlier equity in their retirement pay.[32] Stratton could have added that the subcommittee also supported legislation to give some pre-1949 Reservist-retirees additional retirement pay.[33] This legislation had been specifically recommended by R.O.A.[34]

2. The Fight to Save the Coast Guard Reserve

In 1970, President Nixon's budget contained no funds for the Coast Guard Selected Reserves.[35] The President suggested, in a separate message to Congress, that these Reserves be phased out by the end of fiscal 1971.[36] The resultant savings to taxpayers would amount to approximately $25,000,000.[37] Through testimony by Executive Director Carlton, R.O.A. expressed its shock to the House and Senate Armed Services Committees that President Nixon would recommend this reduction in force.[38]

Many Reservist-Congressmen opposed the President's proposal. Rep. Sikes (D-Florida), a retired Army Reservist, called the Coast Guard Reserve "an essential element of our defense team."[39] Senator Claiborne Pell (D-

---

[31] *The Officer*, February, 1973, at 8.

[32] *The Officer*, May, 1973, at 9.

[33] *The Officer*, February, 1973, at 8.

[34] *Id.*

[35] *The Officer*, April, 1970, at 31.

[36] *Id.*

[37] *The Officer*, June, 1970, at 5.

[38] *The Officer*, April, 1970, at 31.

[39] 116 *Cong. Rec.* 11,691 (1970).

Rhode Island), a 29-year Coast Guard Reservist, conceded his lack of objectivity but nonetheless denounced the Nixon proposal and suggested that the Coast Guard Reserve be funded through the Defense budget, rather than the Department of Transportation appropriations, because "[t]he reality of the situation is simply that the Secretary of Transportation cannot be expected to defend the Coast Guard as vigorously as he should."[40]

On April 8, 1970, Reservist-Representative Charles Bennett introduced H.R. 16,846, which would transfer the Coast Guard to the Department of Defense.[41] According to Executive Director Carlton, the idea for the bill came from R.O.A.:

> Charlie Bennett, we think, got the idea from some people in ROA. We know he was engaged in animated conversation with Si Treib, of Miami, at the Mid-Winter meeting, and then he's talked to some other people in Washington since.
>
> ROA's Legislative Chairman, in his report to the National Council, had said we might work toward getting the Coast Guard Reserve, which is being trained for National Emergency use, transferred to the Department of Defense.[42]

Other Reservist-Congressmen also sponsored legislation designed to save the Coast Guard Reserve. The House Armed Services Committee authorized a Coast Guard Selected Reserve strength of 16,590.[43] Eight of the Commit-

---

[40] 116 *Cong. Rec.* 6,491 (1970). Pell's remarks were also printed in *The Officer*, May 1970 at 7.

[41] 91st Cong., 2d Sess. (1970).

[42] *The Officer*, May, 1970, at 8.

[43] 116 *Cong. Rec.* 17,322 (1970).

tee's twenty-five members were Reservists.[44] After a conversation with Executive Director Carlton, Representative Tom Steed (D-Oklahoma) offered an amendment to the Department of Transportation appropriations bill to increase the House Appropriations Committee recommendations for Coast Guard Reserve funds from $17.5 to $25.9 million.[45] The amendment was actively supported by Reservist-Representatives Robert Sikes (D-Florida), Charles Bennett (D-Florida), and Alexander Pirnie (R-New York).[46]

In early 1971, R.O.A. Legislative Chairman Donald Dawson announced that the Association would continue its support for the Coast Guard Reserve in fiscal 1972:

> . . . already there are in motion steps to save the Select Reserve of the Coast Guard again, and we have every reason to believe that once again we shall succeed and that the Congress will provide the authority and the funds for this important program.
>
> What in the world has deluded certain individual bureaucrats in the government in the thought that we can let that one slip by?[47]

In his 1972 budget, President Nixon requested funds for only 5,000 Coast Guard Select Reservists in order to phase out the entire program by the end of fiscal 1972.[48] The proposal was defeated.

---

[44] House of Representatives *List of Standing Committees*, H.R. Print 37-071 (May 14, 1970).

[45] *The Officer*, September, 1970 at 12; 116 *Cong. Rec.* 17,320 (1970).

[46] 116 *Cong. Rec.* 17,322-3 (1970).

[47] *The Officer*, March, 1971 at 31.

[48] 117 *Cong. Rec.* 12,513 (1971).

Reservist-Representative Alexander Pirnie (R-New York) introduced another bill (H.R. 9,023) to transfer the Coast Guard to the Department of Defense.[49] Other Reservist-Congressmen were busy with proposals to justify appropriations for the Coast Guard Reserves by giving that body an expanded peacetime mission. On September 27, 1971, Reservist-Senator Harrison Williams, Jr. (D-New Jersey) introduced S. 2,600, authorizing the involuntary recall of the Coast Guard Ready Reserve (which includes the Selected Reserve) in times of natural disaster.[50] Senator Williams explained the bill's purpose in a speech on the Senate floor:

> A major reason I advanced [in the previous Congress] for maintaining the Coast Guard Ready Reserve at approximately its existing strength was because of the vital mission that agency can perform in our war against pollution and environmental problems[51]
>
> Today I am pleased to offer a bill, S. 2,600 which would greatly facilitate the use of our Coast Guard Ready Reserve for those duties.[51]

Reservist-Senator Warren G. Magnuson (D-Wash.) later introduced a similar bill, S. 3,591.[52] Identical or similar bills which were introduced in the House during 1971-1972 included H.R. 9,830 (by Reservist-Representative Alexander Pirnie (R-New York);[53] H.R. 9,854 (sponsored by Reservist-Representatives John Hunt (R-New Jersey), Frank Horton (R-New York), John Rhodes, (R-Arizona), John Say-

---

[49] 92d Cong., 1st Sess. (1971).

[50] *Id.*

[51] 117 *Cong. Rec.* S15,155 daily ed. September 28, 1971).

[52] 92d Cong., 2d Sess. (1972).

[53] 92d Cong., 1st Sess. (1971).

lor (R-Pennsylvania), and Joe Waggoner, Jr. (D-Louisiana)),[54] and H.R. 14,891 (sponsored by Reservist-Representatives Frank Clark (D-Pennsylvania) and Hastings Keith (R-Massachusetts).[55] The latter bill was enacted as Pub.L. No. 92-479, 92d Cong., 2d Sess. (1972).

The President's 1973 proposal met its end in Title III of H.R. 8,687, which authorized 15,000 members for the Coast Guard Select Reserve.[56] The measure was supported by Reservist-Representative O. C. Fisher (D-Texas), who chaired the House Armed Services Subcommittee responsible for Reserve affairs.[57] Reservist-Representative Alexander Pirnie (R-New York) continued his advocacy for a strong Coast Guard Reserve in a speech praising H.R. 8,687.[58] Pirnie was later hailed as the "savior of the Coast Guard Reserve" by the New York Coast Guard Chapter of R.O.A.[59]

Although the Title III authorization did not quite match R.O.A.'s recommendations, the Association could still consider its efforts successful.[60] The February, 1972 issue of *The Officer* reported that the Administration had abandoned its plan to abolish the Coast Guard Selected Reserve for the immediate future.[61]

---

[54] *Id.*

[55] 92d Cong., 2d Sess. (1972).

[56] *The Officer*, January, 1972 at 8.

[57] 117 *Cong. Rec.* 19,958-9 (1971).

[58] *Id.*, at 19,961.

[59] 117 *Cong. Rec.* E12,973 (daily ed. December 3, 1971).

[60] R.O.A. had recommended a 16,590 man authorization for the Coast Guard Selected Reserve. *The Officer*, June, 1971 at 28.

[61] *The Officer*, February, 1972 at 3.

3. R.O.A.'s Right to Exempt Its Headquarters—the Minute Man Memorial Building—from Taxation by the District of Columbia

During the 90th, 91st, and 92nd Congresses, Reservist-Representative Robert Sikes (D-Florida) sponsored legislation to free R.O.A.'s headquarters from District of Columbia real estate taxes. Sikes, a former Minute Man of the Year, frequently supports R.O.A. causes. According to the June, 1970 *Officer*, "It is no secret, either in R.O.A. or the Congress, that when we need a real champion in the House, the one to go to is Bob Sikes."[62] According to an earlier *Officer*, Sikes had "the unique distinction of having successfully carried on a campaign among the Members of Congress to obtain contributions to our Minute Man Memorial Building."[63]

Rep. Sikes made his first attempt on October 1, 1968, when he introduced H.R. 20,128 which died in the House District Committee.[64] Rep. Sikes introduced a similar bill, H.R. 2,198, in the next Congress and testified before the Committee in its support.[65] He spoke at length of the great symbolic importance of the Minute Man Memorial Building in perpetuating the "George Washington American Military tradition." He spoke of R.O.A.'s "substantial contributions to the economy of the District." For example, the Association's twenty employees spend their salaries in the District. Representative Sikes pleaded that to spare the R.O.A. building "from taxation by the government it seeks to defend" would only be "simple justice," adding that it would be "inconsistent, unnecessary, and unjust" to tax

---

[62] *The Officer*, June, 1970 at 9.

[63] *The Officer*, April, 1969 at 13.

[64] 90th Cong., 2d Sess. (1968).

[65] 91st Cong., 1st Sess. (1969).

"this great national monument."[66] The bill died in committee.

Rep. Sikes tried again in the next Congress. This time his bill, H.R. 456, 92nd Cong., 1st Sess. (1971), was favorably reported out of the House District of Columbia Committee, on September 23, 1971.[67] In the Senate District Committee, the bill received strong support from Reservist-Senator John Tunney (D-California). The September, 1972 *Officer* described Tunney's assistance in glowing terms:

> Our National President, Brig. Gen. Bob Upp was in town and we went to see Sen. John Tunney, the son of the great world heavyweight champ, and perhaps more importantly, a personal friend of the Upps.
>
> Just like that, Sen. Tunney said he knew about the bill, understood the principle involved, and was all for it. He called in his legislative assistance [sic], Jerry Hill and machinery went into motion.
>
> At hearings just two weeks later, with Sen. Tunney the chairman, we made the case for the record, and the bill was soon on the way. No fanfare, no unnecessary conversations, but a warm, warm feeling that after two frustrating years, the Sikes bill was on its way, and Mr. Tunney, of California, joined our list of heroes.[68]

The bill did not pass. Rep. Sikes has made no attempt so far in the 93d Congress to secure a tax exemption for the Association's headquarters.

---

[66] Statement of the Honorable Robert F. Sikes before the District of Columbia Committee of the House of Representatives, June 17, 1969. The hearings were not printed.

[67] H.R. Rep. No. 507, 92d Cong., 1st Sess. 1 (1971).

[68] *The Officer*, September, 1972 at 5.

APPENDIX C

Legislation Introduced by Reservist-Congressmen Providing Benefits for Reservists

This appendix lists some recent legislation, sponsored or authored by Reservist-Congressmen, which benefits the Reserves or reservists. These bills include:

Efforts to expand Reservist coverage under Servicemen's Group Life Insurance:

Senate bills:

S. 3,549, 92nd Cong., 2d Sess. (1972). Provides full-time S.G.L.I. coverage to Reservists and some Retired Reservists to age 60. (Sen. John Tower (R-Texas)).[1]

S. 1,835, 93rd Cong., 1st Sess. (1973). Increases amount of S.G.L.I. coverage, and extends full time coverage to some Reservists and National Guardsmen. (Sen. Vance Hartke (D-Indiana); Sen. Robert Stafford (R-Vermont); and Sen. Strom Thurmond (R-South Carolina).[2]

House bills:

H.R. 6,737, 91st Cong., 1st Sess. (1969). Provide S.G.L.I. to Reservists and National Guardsmen during full-time training or duty. (Rep William Bray (R-Indiana)).[3]

H.R. 13,168, 92nd Cong., 2d Sess. (1972). Extends full-time S.G.L.I. coverage to Reservists, National Guardsmen, and some retired Reservists to age 60. (Rep. G. V. Montgomery (D-Mississippi)).[4]

---

[1] 118 *Cong. Rec.* S6,745 (daily ed. April 27, 1972).

[2] *CCH Congressional Index—93d Congress.*

[3] *CCH Congressional Index—91st Congress.*

[4] *CCH Congressional Index—92d Congress.*

H.R. 14,742, 92nd Cong., 2d Sess. (1972). Identical to H.R. 13,168. (Rep. G. V. Montgomery (D-Mississippi); Rep. Olin Teague (D-Texas); Rep. John Saylor (R-Pennsylvania); Rep. Chalmers Wylie (R-Ohio), Rep. John Hammerschmidt (R-Arkansas); Rep. David Satterfield (D-Virginia)).[5]

H.R. 825, 93rd Cong., 1st Sess. (1973). Extend full-time S.G.L.I. coverage to Reservists, National Guardsmen, and some retired Reservists. The bill was endorsed by R.O.A. (Rep. G. V. Montgomery (D-Mississippi)).[6]

H.R. 3,473, 93rd Cong., 1st Sess. (1973). Extend full-time S.G.L.I. coverage to Reservists, National Guardsmen, and some retired Reservists. (Rep. Bill Nichols (D-Alabama)).[7]

H.R. 6,574, 93d Cong., 1st Sess. (1973). Extend full-time S.G.L.I. coverage to Reservists, National Guardsmen, and some retired Reservists. (Rep. G. V. Montgomery (D-Mississippi); Rep. John Hammerschmidt (R-Arkansas); Rep. Olin Teague (D-Texas); Rep. Ray Roberts (D-Texas); Rep. John Saylor (R-Pennsylvania); Rep. Chalmers Wylie (R-Ohio)).[8]

H.R. 6,795, 93rd Cong., 1st Sess. (1973). Similar to H.R. 6,574. (Rep. G. V. Montgomery (D-Mississippi)).[9]

---

[5] *Id.*

[6] *CCH Congressional Index—93d Congress; The Officer*, April, 1973, at 6.

[7] *CCH Congressional Index—93d Congress.*

[8] *Id.*

[9] *Id.*

H.R. 7,517, 93rd Cong., 1st Sess. (1973). Similar to H.R. 6,574. (Rep. Burt Talcott (R-California)).[10]

Bills to allow Reservists to receive retirement pay before age 60—the current[11] minimum age at which retirement pay may be received for nonregular service:

Senate bills:

S. 2,767, 92nd., 1st Sess. (1971). Provides payment of retirement pay actuarily computed to persons otherwise eligible at age 50. (Sen. Strom Thurmond (R-South Carolina); Sen. J. Glenn Beall, Jr. (R-Maryland); Sen. Jacob Javits (R-New York); Sen. John Tower (R-Texas)).[12]

S. 330, 93rd Cong., 1st Sess. (1973). Identical to S. 2,767. (Sen. Strom Thurmond (R-South Carolina)).[13]

House bills:

H.R. 16,288, 91st Cong., 2d Sess. (1970). Allows Reservists and National Guardsmen to receive retirement pay at age 55. (Rep G. V. Montgomery (D-Mississippi)).[14]

H.R. 942, 92nd Cong., 1st Sess. (1971). Similar to H.R. 16,288. (Rep. G. V. Montgomery (D-Mississippi)).[15]

H.R. 6,128, 92d Cong., 1st Sess. (1971). Eliminates the requirement that an individual must be age 60 or over to receive retirement pay for nonreg-

---

[10] *Id.*

[11] 119 *Cong. Rec.* S454 (daily ed. January 11, 1973).

[12] *CCH Congressional Index—92 Congress.*

[13] 119 *Cong. Rec.* S454 (daily ed. January 11, 1973).

[14] *CCH Congressional Index—91st Congress.*

[15] *CCH Congressional Index—92d Congress.*

ular service. (Rep. Richard Fulton (R-Tennessee)).[16]

H.R. 13,642, 92d Cong., 2d Sess. (1972). Allows payment of retired pay at reduced percentages for non regular service to persons otherwise eligible at age 50. (Rep. Charles Bennett (D-Florida)).[17]

H.R. 824, 93d Cong., 1st Sess. (1973). Allows Reservists and National Guardsmen to receive retirement pay at age 55 for nonregular service. (Rep. G. V. Montgomery (D-Mississippi)).[18]

Bills to provide incentives for Reserve service:

Senate bills:

S. 1,470, 92d Cong., 1st Sess. (1971). Provides enlistment bonuses for Reservists. The bill was "mandated" by R.O.A. (Sen. Strom Thurmond (R-South Carolina); Sen. Edward Gurney (R-Florida)).[19]

S. 3,360, 92d Cong., 2d Sess. (1972). Provides payment of enlistment and re-enlistment bonuses to Reservists. (Sen. John Tower (R-Texas)).[20]

S. 937, 93d Cong., 1st Sess. (1973). Provides payment of enlistment and re-enlistment bonuses to Reservists. (Sen. Strom Thurmond (R-South Carolina)).[21]

---

[16] *Id.*

[17] *Id.*

[18] *CCH Congressional Index—93d Congress.*

[19] *CCH Congressional Index—92d Congress;* 117 *Cong. Rec.* 9,170-1 (1971); *The Officer,* December, 1971 at 24. The R.O.A. has a Legislative Committee, traditionally composed of reservists in the House and Senate, which drafts bills for R.O.A. Levantrosser, Congress and the Citizen-Soldier 82, 107, 116, 191, 196 (1968); See *The Officer,* May, 1973 at 12; June, 1973 at 10; pp. 35a-36a, 37a-38a, *infra.* "Mandate" appears to refer to R.O.A.'s specific interest in a bill and support of its passage.

[20] 118 *Cong. Rec.* S3,999 (daily ed. March 15, 1972).

[21] 119 *Cong. Rec.* S2,965 (daily ed. February 21, 1973).

House bills:

H.R. 6,724, 91st Cong., 1st Sess. (1969). Provides incentives for participation in the Ready Reserves. (Rep. William Bray (R-Indiana)).[22]

H.R. 6,051, 92d Cong., 1st Sess. (1971). Establishes incentives for participation in the Ready Reserves. (Rep. G. V. Montgomery (D-Mississippi)).[23]

H.R. 15,501, 92d Cong., 2d Sess. (1972). Identical to H.R. 6,051. (Rep. Sikes (D-Florida)).[24]

H.R. 13,807, 92d Cong., 2d Sess. (1972). Establishes incentive plan for Ready Reserve participation. (Rep. Charles Bennett (D-Florida)).[25]

H.R. 87, 93d Cong., 1st Sess. (1973). Provides incentive plan for participation in the Ready Reserves. (Rep. Charles Bennett (D-Florida)).[26]

Miscellaneous benefits:

Senate bills:

S. 452, 92d Cong., 1st Sess. (1971). Allows enlisted men to credit Reserve service for retirement pay purposes. The bill was mandated by R.O.A. (Sen. Daniel Inouye (D-Hawaii)).[27]

S. 806, 92d Cong., 1st Sess. (1971). Authorizes medical, dental, and other benefits for Reservists and National Guardsmen under certain conditions.

---

[22] *CCH Congressional Index—91st Congress.*

[23] *CCH Congressional Index—92d Congress.*

[24] *Id.*

[25] *Id.*

[26] *CCH Congressional Index—93d Congress.*

[27] *The Officer,* December, 1971 at 24.

The bill was mandated by R.O.A. (Sen John Tower (R-Texas)).[28]

S. 1,471, 92d Cong., 1st Sess. (1971). Provides benefits to survivors of Reservists who die before age 60. The bill was mandated by R.O.A. (Sen. Strom Thurmond (R-South Carolina); Sen. Edward Gurney (R-Florida)).[29]

S. 2,149, 93d Cong., 1st Sess. (1973). Provides benefits to Coast Guard Reservists. (Sen. Russell Long (D-Louisiana); Sen. Warren Magnuson (D-Washington)).[30]

House bills:

H.R. 6,725, 91st Cong., 1st Sess. (1969). Provides proficiency pay for enlisted members of Reserve forces. (Rep. William Bray (R-Indiana)).[31]

H.R. 387, 91st Cong., 1st Sess. (1969). Allows enlisted men to credit Reserve service for retirement pay purposes. The bill was mandated by R.O.A. (Rep. Robert Wilson (R-California)).[32]

H.R. 509, 92d Cong., 1st Sess. (1971). Similar to H.R. 387. The bill was mandated by R.O.A. (Rep. Robert Wilson (R-California).[33]

H.R. 6,049, 92d Cong., 1st Sess. (1971). Provides proficiency pay for enlisted members of Reserve

---

[28] *CCH Congressional Index—92d Congress. The Officer*, December, 1971 at 24.

[29] *Id.*

[30] *CCH Congressional Index—93d Congress.*

[31] *CCH Congressional Index—91st Congress.*

[32] *The Officer*, March, 1970 at 16.

[33] *The Officer*, December, 1971 at 24.

forces. The bill was mandated by R.O.A. (Rep. G. V. Montgomery (D-Mississippi)).[34]

H.R. 6,050, 92d Cong., 1st Sess. (1971). Provides benefits to survivors of Reservists who die before age 60. The bill was mandated by R.O.A. (Rep. G. V. Montgomery (D-Mississippi)).[35]

H.R. 11,447, 92d Cong., 1st Sess. (1971). Provides medical, dental, and other benefits for Reservists and National Guardsmen under certain conditions. (Rep. O. C. Fisher (D-Texas)).[36]

H.R. 12,889, 92d Cong., 2d Sess. (1972). Allows Reservists to be eligible for certain cash awards. (Rep. William Nichols (D-Alabama)).[37]

---

[34] *Id.*

[35] *Id.*

[36] *CCH Congressional Index—92d Congress.*

[37] *The Officer*, December, 1972 at 20.

APPENDIX D

Reservists on the Senate Armed Services Committee: DOD Nominees

The Senate Armed Services Committee is in a key position to influence Department policy. One of its functions is to report to the Senate, for confirmation, on Presidential nominees for high Defense Department positions.

When Roger T. Kelley, nominated to be Assistant Secretary for Manpower and Reserve Affairs, came before the committee to testify, he noted:

> I was reminded early, Mr. Chairman, of the importance of the Reserve components in our local defense system. You may recall when I came before this committee for confirmation, you reminded me that if I did not make Reserve matters a high priority matter, I could anticipate difficulty with this committee, and I have not forgotten that.[1]

At this time, 11 out of 18 member Senators on the Armed Services Committee were reservists.[2]

Other Defense Department nominees were likewise reminded to make Reserve affairs a "high priority matter," particularly with respect to issues personally affecting Reservist-Congressmen. Reservists-Senator Margaret Chase Smith (R-Maine) sounded out nominees Stanley Resor (Secretary of the Army), John Chafee (Secretary of the Navy), Robert Seamans, Jr. (Secretary of the Air Force), J. William Doolittle (Assistant Secretary of the Air Force (Manpower and Reserve Affairs)) and Ernest Massad (Deputy Assistant Secretary of Defense for Re-

---

[1] Hearings on S. 1192, S. 2407 and S. 2546 Before the Senate Comm. on Armed Services, 91st Cong., 1st Sess., Pt. 2, at 1909 (1969).

[2] List of Congressmen-Reservists, furnished by Department of Defense, April, 1970.

serve Affairs), on the question of reinstating the Congressional Reserve Units and allowing Congressmen to earn points toward promotion and retirement.[3] Reservists Senators Strom Thurmond (R-So. Car.) and Daniel Inouye (D-Hawaii) took up the same line of questioning.[4]

Reservist-Senator Barry Goldwater (R-Ariz.) denounced McNamara's 1967 decision to remove Congressmen from the Ready Reserves,[5] and Reservist-Senator Howard Cannon (D-Nevada) urged Doolittle not to be bound by prior Defense Department policy in this matter.[6] Each nominee was asked to report back to the committee after reviewing the matter. Kelley and Massad stated that they had already made recommendations to Secretary of Defense Laird in support of re-establishing the Congressional Unit.[7]

---

[3] Hearings on the Nomination of Stanley R. Resor to be Secretary of the Army, John Chafee to be Secretary of the Navy and Robert Seamans, Jr. to be Secretary of the Air Force, before the Senate Comm. on Armed Services, 91st Cong., 1st Sess. at 5, 15, 26 (1969). Hearings on Nomination of J. William Doolittle to be Assistant Secretary of the Air Force, before the Senate Comm. on Armed Services, 90th Cong., 2d Sess at 23 (1968). Hearings on S. 1192, S. 2407 and S. 2546, before the Senate Committee on Armed Services, 91st Cong., 1st Sess. at 1931 (1969).

[4] Hearings on the Nomination of Stanley R. Resor to be Secretary of the Army, John Chafee to be Secretary of the Navy and Robert C. Seamans, Jr. to be Secretary of the Air Force, before the Senate Comm. on Armed Services, 91st Cong., 1st Sess. at 6, 7. Hearings on S. 1192, S. 2407 and S. 2546, before the Senate Comm. on Armed Services, 91st Cong., 1st Sess., at 1924, 1925 (1969).

[5] Hearings on S. 1192, S. 2407 and S. 2546, before the Senate Comm. on Armed Services, 91st Cong., 1st Sess., at 1924 (1969).

[6] Hearings on Nomination of J. William Doolittle to be an Assistant Secretary of the Air Force Before the Senate Comm. on Armed Services, 90th Cong., 2d Sess. at 24 (1968).

[7] Hearings on S. 1192, S. 2407 and S. 2546 Before the Senate Comm on Armed Services, 91st Cong., 1st Sess., at 1924, 1931 (1969).

APPENDIX E

Miscellany

1. In 1963 Representative Ed Edmondson of Oklahoma inserted into the Congressional Record remarks by Congressman Clark Thompson of Texas (a retired Army Reserve Colonel) in a newsletter to his constituents. 109 Cong. Rec. 13334 (1963). Congressman Thompson attributed his initial decision to enter Congress to the suggestions of fellow Reservists, and added:

> "My knowledge of the need of national defense came largely through my membership in the reserve . . . . I have cast some votes which were more intelligent because of my intimate knowledge of the workings of the armed forces."

2. In that same year Congressman Carl M. Vinson inserted in the Record a resolution of the Reserve Officers' Association announcing that the R.O.A. "would perpetuate a tribute to the citizen-soldier Members of the Congress of the United States by establishing in the Memorial Building a Congressional Hall." 109 Cong. Rec. A4283-4 (1963).

3. From the debates on the National Reserve Act of 1955, 101 Cong. Rec. 6493-94 (1955) (House of Representatives) Mr. Nelson (of Maine):

> Who am I to question the judgment of the greatest military geniuses of our time . . . I would, however, in the small time allowed to me, as a plain country lawyer from Maine, as a man who has served his country, and who has served in a Reserve unit and who is presently a member of the Air National Guard, like to express the doubts which I have about this bill . . .
>
> (Nelson went on to cite opposition to the bill within "the Air Force Association, the Naval Reserve Association, the National Guard, and the Air National

Guard". At this point Chairman Vinson of the Armed Services Committee responded.)

Mr. Vinson:

> The gentleman is a member of the Committee on Armed Services, and he had ample opportunity there in the committee to point out what should take the place of this program. I am not trying to be critical, but I would appreciate it, and the Congress would appreciate it, and the committee would be benefited if the gentleman would offer his alternative to this proposition.

Mr. Nelson:

> Well, there are a good many alternatives, I would say to my distinguished chairman. I would just suggest one to him that was suggested to me by the members of the National Guard. The National Guard feel they could completely and adequately take care of this problem if their appropriation was increased and their quota increased to take care of this number of men, 100,000 a year. But the Army does not want them in the Guard.

(Chairman Vinson subsequently introduced a new bill, H.R. 7000, 84th Cong., 1st Sess., "omitting almost all provisions dealing with the National Guard" to which the Guard had objected. Levantrosser, *Congress and the Citizen-Soldier* 66 (1968).)

4. From the same debates, 101 Cong. Rec. 6503-04 (1955). Mr. Teague (of Texas) (arguing for more emphasis on the Reserves):

> I received my Reserve commission back in 1933 and kept my Reserve commission and kept up my Reserve work—not because of any encouragement or help from the Regular service but in spite of them. . . .

Mr. Chairman, in closing I would like to say that the reservist is a needed individual in the defense scheme of our country. He is the best friend that the Department of Defense has because he will support any worthwhile legislation or any congressional budget within reason for the improvement of national defense. In peace he will give up his recreation and spare time to carry on his military training. In war he will liquidate his business and professional career to serve in the Armed Forces. He only asks for the right to train and serve in the highest capacity in which he is capable—to be recognized and treated as an equal part in the service of his country. A civilian soldier in peace or in war is a valuable part of our Nation's security forces.

5. From the same debates, 101 Cong. Rec. 6555 (1955). Mr. Van Zandt (of Pennsylvania):

Mr. Chairman, I rise in support of H.R. 5297, a bill which in my opinion, will provide the Nation with an adequate Reserve. It appears that to qualify for the purpose of discussing this bill one should mention his military background. I should like to point out that on April 29, 1955, I finished 38 years as a member of the United States Naval Reserve. I now command a brigade of Naval Reserves; 60 divisions, 3000 men. I attend drills regularly, and tonight if any of you want to visit our unit, if you will come down to the Auditorium on Constitution Avenue you will see one of the units in action. Therefore, I feel qualified to talk about the Reserves. . . .

I recall when World War II broke out. Those of us in the Reserves quit our jobs. I resigned my seat in Congress and took up my commission as an officer aboard a destroyer in the North Atlantic. A lot of us oldtimers in the Reserves have worried about the future of the Reserves and, in my opinion, we are in favor of this legislation almost unanimously.

6. Hearings, *National Reserve Plan*, F.R. 2967, before the House Committee on Armed Services, Committee Paper No. 11, 84th Cong., 1st Sess. (1955), p. 1742.

Mr. Brooks (of Louisiana, subcommittee chairman, introducing Senator Strom Thurmond of South Carolina as a witness):

> I know of your record as Governor of South Carolina and late president of the Reserve Officers Association, and now United States Senator you have, in effect, three hats to wear.
>
> This morning we will be glad to hear from you in any one of these capacities or all three.

Senator Thurmond: . . . .

> I am Strom Thurmond, national president of the Reserve Officers Association. It is a pleasure and a privilege for me to appear before this distinguished group to present the views of our association on the various steps that need to be taken to strengthen the Reserve Forces of our country.
>
> • • •
>
> The Reserve Officers' Association supports fully the broad objectives and aspects of the administration's plan to strengthen the Reserve Forces. It does, however, disagree with some of the details of the bill being considered and also certain of the purposes which this bill is designed to accomplish.
>
> • • •

pp. 1743-44:

> . . . we created within the Reserve Officers' Association a committee of extremely competent and experienced Reserve Officers from all services, headed by Brigadier General Wendell Westover of Albany, New

York. This committee was directed to study all facets of this problem and to bring forth in general terms a plan which could serve as a basis for our association's position in the steps being taken to improve our Reserve structure. It reported on February 6, 1955 . . . The committee had the benefit of much of the thinking that had gone on within the Defense Department and the Office of Defense Mobilization, and in my opinion has completely met the difficult problems presented to it.

Incidentally, Mr. Chairman, I must call your attention to the wonderful cooperation that now exists between these two Government agencies and our organization. The association has been proud of the opportunity given it to work with them in considering the various aspects of the Reserve problem which led to the legislation presently before you. We feel that this committee should know of our high opinion of the diligent effort and intelligent leadership that has been given to this problem by the Assistant Secretary of Defense for Manpower and Personnel, Mr. Carter L. Burgess, and the Director of the Office of Defense Mobilization, Dr. Arthur S. Fleming. We feel that they are to be complimented on evolving a platform on which, with certain modification, we believe a proper Reserve can be developed.

The association plan, predicated on our committee report, is not intended to be a substitute for the Department of Defense recommendations but rather provides an augmentation and a more speedy implementation of certain aspects of their program. We have attached to our statement a copy of this report and request it be made a part of the official record on this bill.

7. (Contemporaneously, Senator Thurmond published articles in the Reserve Officers' Association journal, *The Reserve Officer.*)

Vol. 31, February, 1955:

Thurmond, *For Which So Many Have Died:*

> Reservists as typical Americans saw their country as a way of life composed of many wonderful ideas; and what's more, promised themselves if they came out alive to do something to achieve them, such as:
>
> Every man has a responsibility to the defense of his homeland and should have the opportunity to prepare himself accordingly.
>
> That Regulars and Reserves are members of one team—that neither occupies a privileged status over the companion component.
>
> That recognition, opportunity and advancement in the military forces must be on an equitable basis. . . .

Vol. 31, March, 1955:

Thurmond, *Red Ink or Red Soldiers:*

> We do not want a national budget written in red ink any longer than is necessary, but if the choice is between red ink on our books and red soldiers on our door steps, then I know we would all choose the red ink on our books.
>
> At present, our reserves comprise almost skeleton units that are not in what we would call a state of combat readiness. We lack the personnel, adequate training facilities, modern equipment, and the latest weapons of war. Once our needs are fulfilled, however, we can build a strong combat-ready reserve, and we can maintain several reservists for the cost of one regular.
>
> We would then be in a position to kill two birds with one stone: remain strong both militarily and economically. Regardless of whether the regular establish-

ment is reduced, the position of the ROA is that a strong reserve force be built up as the reserve is the heart and core of our national defense program. It is imperative that the full energies of our nation's military and civilian authorities be translated into positive action for the buildup and maintenance of a strong ready reserve force.

Vol. 31, July, 1955:

National President's Report (upon the end of Senator Thurmond's term of office as President of ROA):

Despite the demands upon a United States Senator, it has been possible for me to visit many of our Departments and Chapters during the past year. Frankly it has not been easy. However, my sincere admiration for those contributing to ROA's progress and stability encouraged me to find ways and means of sharing your meetings. Consequently, at every opportunity I accepted invitations to address ROA and reservist meetings.

... During the past year, I have had the pleasure of at least six meetings with President Eisenhower. Our subjects of conversation concerned the Reserve Forces and ROA. We discussed the steps necessary for improving the morale, welfare, and status of the Reserve officer and his counterpart in the Regular Establishment. We also discussed the need for a revitalized Reserve as featured in the National Reserve Plan.

Contacts with Pentagon officials during the past year have been too numerous to mention.

On several occasions the ROA vice presidents came to Washington and joined me in Pentagon conferences. Appearances at appropriate times were made before the Reserve Forces Policy Board of the Secretary of Defense. In all our contacts, individually and col-

lectively, we left no doubt as to ROA's determination to achieve a truly Ready Reserve, so necessary to national defense and the future of our country.

May I say at this point, that never in the history of our Association has our relationship with Pentagon officials—both civilian and military—been as pleasant and harmonious as at present. A "new look" has developed in Defense Department attitudes toward ROA. A large portion of this change is due to the fine cooperation of defense leaders . . . [Assistant Secretary Carter] Burgess and several of the others are reserve officers and their broad experience in military matters and keen insight to Reserve problems have made them valuable leaders in our Defense establishment.

These far-sighted gentlemen recognize that ROA is a buttress of strength in support of adequate national defense. They are aware of the citizen-reservist's ability to walk sometimes where Regulars fear to tread.

Thus, in the past year, many positive steps toward progress have been recorded through better understanding and cooperation. We of ROA should exert every effort to promote and sustain this cooperation.

8. Hearings, *Proposed Reduction of National Guard* before the House Committee on Armed Services, Committee Paper No. 77, 85th Cong., 2d Sess. (1958).

Testimony of Representative Leroy Anderson of Montana, p. 5789:

I am the commanding general of the 96th Infantry Division (Reserves) which is the major Reserve organization in the Rocky Mountain States of Montana, Idaho, Utah, and Arizona. I have for many years been a member of the Reserve Officers' Association Army affairs committee and I am a member of the advisory board of

the Senior Reserve Commanders' Association which includes most of the general officers of the Army Reserve, ...

Civic, business, and political leaders frequently belong to the Reserve unit in their community .... In 1948, my chief of staff was elected to be governor of the great state of Montana. He continued on as my chief for some months, but the workload got so heavy he said he'd have to give up one of his jobs.

p. 5792:

Speaking as a Reserve Commander, I, together with other representative Reserve commanders, members of the panel of the General Staff Committee on National Guard and Army Reserve Policy, and officers and representatives of the Reserve Officers' Association have seen and to some extent studied the proposed revised USAR troop basis.

These reserve leaders have expressed deep concern over any loss in units. They deplore any further reductions from the presently authorized—10—USAR combat divisions.

May I emphasize that the original troop structure of the Reserve components of the Army provided for 25 Army Reserve combat infantry divisions. This original authorization of 25 divisions was reduced to 10, as a result of the last reorganization of the Reserve troop structure. As a Reserve commander, I must voice the unanimous opinion of all reservists: We cannot accept a still further reduction of these combat divisions. Reductions from the present USAR divisional authorization, together with other unit losses, particularly higher headquarter type units—corps and brigades—staffed by field grade officers, will not be easily accepted by members of the Army Reserve.

9. Address by Sen. Margaret Chase Smith (Lt. Col., Air Force Reserve) to the 29th convention of the Reserve Officers Association (ROA), *The Reserve Officer*, Vol. 31, August 1955, pg. 12:

> . . . For a decade now I have been fighting for Reserve measures—for realistic Reserve measures—for Reserve parity with the Regulars . . . I introduced a bill to provide for inactive training pay . . . a bill to provide for Reserve retirement . . . a bill to provide death and disability coverage for Reservists in that hiatus period when the shooting had stopped but the war status had not been declared at an end.

10. Report of the Legislative Committee of the ROA, *The Officer*, Vol. 25, July 1959, pg. 11, Rep. Leroy Anderson (Chairman):

> Now it can be reported that our situation in the Congress is favorable and that there has been no appreciable change in the devotion of the Congress to the Reserve Tradition. Much of this, of course, is due to the persistent application to their duties of your ROA representatives.

11. *The Officer*, Vol. 25, September 1959, pg. 3:

> Traveler—Rep. LeRoy Anderson (Major General, USAR) is traveling to the Middle East for the House Armed Services Committee this Fall. He plans to spend two weeks visiting ROA chapters in Europe en route, beginning 20 October, and returning via Orient, Far East, and Hawaii Departments in November.

12. *The Officer*, Vol. 25, October 1959, pg. 8, Col. Jesse B. Stewart, *ROA Legislation as Seen from the Summit:*

> There is no reason why members of Congress should not openly subscribe to this Association's objective, of supporting a military policy designed to guarantee national security. As the 1958-1959 administration in

ROA approached, overtures to a number of Congressmen-members were made, and the response was encouraging. Rep. LeRoy Anderson of Montana, accepted the chairmanship, and serving at the top level with him was the longtime ROA stalwart, Rep. James E. Van Zandt, of Pennsylvania, and among the leaders on the Senate side was Senator Strom Thurmond, of South Carolina, a former National President of ROA. At one of the early meetings, the propriety of the situation was discussed frankly, and it was agreed to look upon the group as the Legislative Advisory Committee, and to look to the ROA professional staff to continue to present the case, in hearings, before various committees.

Van Zandt, a Navy Captain put it this way: "That is just for the sake of comfort. Actually, there could rarely be a situation involving a conflict of interest. For years in the Congress, I have given first thought to representing the views of the people of my district, and my activities in various Citizen groups has helped me, I think to be a better Representative."

13. *The Officer*, Vol. 26, March 1960, pg. 5, Report of the Legislative Advisory Committee of the ROA:

Rep. Robert Sikes, Chairman

There are about 175 Reserve Officers or former Officers in the Congress—probably the largest single group with special knowledge in the Congress. Our committee represents, however, not simply this group but the entire Congress. I can't believe that there is any especial tinge to the patriotism of an officer that cannot be found to be the general mark of the entire Congress, for the United States has a good Congress . . .

Yet, by careful planning, skillful presentations, and forceful logic, we came to the end of the halfway mark in the 86th Congress—the adjournment *sine die*

of the First Session, to note that one after another an amazing series of ROA sponsored bills had been passed by both houses and signed by the President.

14. *The Officer*, July, 1960, pg. 10, Vol. 36, Report of the Legislative Advisory Committee of the ROA, Rep. Sikes:

> . . . We in ROA who also belong to Congress have this year committed ourselves to work shoulder-to-shoulder with you. It is now your turn again.

15. *The Officer*, Vol. 38, August 1962, pg. 26, Legislative Report, Senator Ralph Yarborough:

> [discussing the call-up of 150,000 reservists the previous year]
>
> . . . in the Army the administrative errors had created problems which generated confusion, dissatisfaction with Reserve programs, and handed to those hostile to the Citizen-Reservist tradition weapons which they did not hestitate to use with effectiveness.
>
> Our Association responded, of course, by fighting back. Over a period of months we engaged in a propaganda war. I will say to the credit of our staff, and to those in the Congress who understand and support the great Citizen-Reserve concept, that while substantially outnumbered and forced to fight against those with almost limitless resources and manpower, ROA had done a magnificient job.

16. *The Officer*, Vol. 39, pg. 11, The New ROA Legislative Affairs Committee:

> Sen. George Smathers upon accepting the Chairmanship:
>
> "ROA's unique character and activity is reassuring, as well as inviting to all of us in Congress who support the Association's aims."

Committee members:

Sen. Ralph Yarborough	Rep. Stephen Derownian
Sen. Hugh Scott	Rep. William Mailliard
Sen. Gordon Allott	(Calif.)
Sen. Barry Goldwater	Rep. Carl Albert
Sen. Strom Thurmond	Rep. Ray Roberts (Tex.)
Sen. Howard Cannon	Rep. Clement Zablocki
Rep. Robert Sikes	Rep. Charles Chamberlain

17. *The Officer*, Vol. 40, November 1964, pg. 10, "Sikes is a Real Soldier," Col. John T. Carlton:

> [discussing the 42nd anniversary meeting of the ROA in Omaha]
>
> . . . Congressman Bob Sikes is a serious Reserve Officer, dedicated in his service as an ROA member, and with a keen insight into military problems, an earnest and highly motivated Citizen leader. He is a "good soldier." He has given fully of his time and talents whenever ROA has called upon him. He has established the setting and the spirit which has enabled the Association to maintain its high prestige and to roll up a quite remarkable record in 1964 as in the past.

18. *The Officer*, Vol. 42, August 1966, pg. 11, Remarks of Rep. Sikes to the 40th Annual Convention of the ROA:

> We must seize initiative and press forward. We need the enactment of legislation which will preserve and protect the Reserves. The evidence of the past 18 months has made it perfectly clear that the Congress if it is to carry out its constitutional responsibility must specify in detail the national policy and law governing this very important element of our national security team.
>
> We need a Bill of Rights for the Reserves.

REPLY BRIEF OF PETITIONER

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1188

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, ET AL., PETITIONERS

v.

RESERVISTS COMMITTEE TO STOP THE WAR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

1. In the district court respondents' claim that they had standing to maintain this suit as citizens was rested upon their "interest in" and "right to" the "unbiased consideration by the Congress" of military matters (App. 41-42). They now assert, however—presumably in response to our argument (Pet. Br. 8, 16) that they were merely asserting a "general interest, common to all citizens, in constitutional governance" which was "divorced of any concrete impact" upon themselves—that their complaint alleges "very specific injuries" to "respondents' ability to persuade the Congress in directions favored by respondents" and to their ability "to join with others in an effort to make political advocacy effective" (Resp. Br. 7, 11).

Nowhere in the complaint, however, did respondents refer to any particular legislation they supported with

respect to which the membership of Congressmen in the reserves resulted in unfair or inadequate Congressional treatment of the legislation. The simple fact is that respondents simply have not alleged any specific, perceptible injury to themselves. That respondents are merely seeking to use the court to air their political grievances and to obtain a judicial resolution of them is confirmed by the following statement in their brief (p. 10):

> The familiar decisions of this Court that have narrowed the obstacle of standing demonstrate a commitment to permitting important grievances of private citizens against an increasingly all-powerful government to be litigated in the courts, not fought in the streets. * * *

2. Respondents' claim of standing as taxpayers fares no better. Nowhere in the complaint did respondents challenge any specific appropriations for, or any legislation involving, the Armed Forces. The complaint (App. 37-51) merely challenges the legality of the status of Congressmen as reservists. There is no challenge to the exercise of Congressional power under Article I, §8, or to any Congressional enactment. As we pointed out in our main brief, "[b]y no stretch of the imagination can the situation complained of, the presence of congressmen in the reserves, be called congressional action under the taxing and spending clause" (p. 23). Not only do respondents thus fail to meet the first aspect of the limited basis upon which taxpayers were granted standing in *Flast* v. *Cohen*, 392 U.S. 83—that they must demonstrate the unconstitutionality "of exercises of congressional power under the taxing and spending clause" (p. 102)—but they also do not satisfy the second requirement that they "must show

that the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power" (pp. 102-103). The claim that the holding of reserve commissions by Members of Congress constitutes "holding [of] Office under the United States" in violation of Article I, Section 6, Clause 2 of the Constitution does not come within the latter condition.

3. Finally, respondents urge that the limitations in Article I, Section 6, Clause 2 are a restraint not only upon the Legislative Branch, but also upon the Executive Branch. The Clause in terms does not so provide. Its prohibition is that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office." Moreover, as shown in our main brief (pp. 31-42), both the history of the provision and Congressional interpretation of it have treated it as imposing a qualification for membership in Congress, not a limitation upon the Executive Branch in making appointments to office there. To whatever extent the Executive Branch may be guided by or observe the prohibition, that is a matter within its discretion. It is not something that the courts should attempt to impose upon the Executive Branch.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

DOJ-1974-01

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

SCHLESINGER, SECRETARY OF DEFENSE, ET AL. *v.* RESERVISTS COMMITTEE TO STOP THE WAR ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-1188. Argued January 14, 1974—Decided June 25, 1974

Respondents—an association of present and former members of the Armed Forces Reserve opposing United States involvement in Vietnam, and five association members who were United States citizens and taxpayers—brought a class action on behalf, *inter alia*, of all United States citizens and taxpayers against petitioners, the Secretary of Defense and three Service Secretaries, challenging the Reserve membership of Members of Congress as violating the Incompatibility Clause of Art. I, § 6, cl. 2, of the Constitution, which provides that "no person holding any office under the United States, shall be a Member of either House during his continuance in office." The District Court held that respondents had standing to sue as citizens but not as taxpayers, and on the merits granted partial relief. The Court of Appeals affirmed. *Held:*

1. Respondents had no standing to sue as citizens, since the claimed nonobservance of the Incompatability Clause which they assert deprives citizens of the faithful discharge of the legislative duties of Reservist Members of Congress implicates only the generalized interest of all citizens in constitutional governance and is thus merely an abstract injury rather than the concrete injury that is essential to satisfy Art. III's "case or controversy" requirement. Pp. 8-19.

2. Respondents also lacked standing to sue as taxpayers, since they failed to establish the required "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U. S. 83. Pp. 19-21.

Reversed and remanded.

Syllabus

BURGER, C. J., delivered the opinion of the Court, in which STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEWART, J., filed a concurring opinion. DOUGLAS, J., filed a dissenting opinion, in which MARSHALL, J., joined. BRENNAN and MARSHALL, JJ., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-1188

James R. Schlesinger, Secretary of Defense, et al., Petitioners, v. Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari, 411 U. S. 947 (1973), to review the judgment of the Court of Appeals affirming, without opinion, the District Court's partial summary judgment for respondents declaring that "Article I, Section 6, Clause 2 of the United States Constitution renders a Member of Congress ineligible to hold a commission in the Armed Forces Reserve during his continuance in office." 323 F. Supp. 833, 843 (D. D. C. 1971). We hold that respondents do not have standing to sue as citizens or taxpayers. The judgment of the Court of Appeals is therefore reversed.

I

Article I, § 6, cl. 2, of the Federal Constitution provides:

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no person holding any office under the United

> States, shall be a Member of either House during his continuance in office."

The Constitution thereby makes Members of Congress ineligible for appointment to certain offices through the limitation of the Ineligibility Clause, and prohibits Members of Congress from holding other offices through the latter limitation, the Incompatibility Clause.

Respondents, the Reservists Committee to Stop the War and certain named members thereof,[1] challenged the Reserve membership of Members of Congress[2] as being

---

[1] The Committee, located in California, is a national unincorporated association of present and former officers and enlisted members of the Reserves, organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to take all steps necessary and appropriate to end that involvement. The five individual respondents were all members of the Committee, residents of California, and United States citizens and taxpayers. At the time suit was filed, four of the individuals were in active Ready Reserve status; the status of the fifth, then the Committee cochairman, was unspecified.

[2] At the time suit was filed, 130 Members of the 91st Congress were also members of the Reserves, which are divided into Ready, Standby, and Retired components. By the end of the 92d Congress, 119 Members were Reservists. The 93d Congress has seen the number of its Reservists reduced to 107, all but one of whom is a commissioned officer, App., at 5, and none of whom can occupy the Ready Reserve status of the individual Respondents, *supra*, n. 1. Dept. of Defense Dir. 1200.7 § v, c. 2 (July 2, 1970), 32 CFR § 125.4 (c)(2). Of the 107, 19 are in the active and 12 in the inactive Standby Reserve; and 76 are in the Retired Reserves, 16 of whom receive retirement pay. One other Member is in the Army National Guard, and thus in the Ready Reserve, 10 U. S. C. § 269 (6), but since the governors of the various States control appointments to offices in the Guard, Petitioners could not provide relief regarding such Reservists. The judgment of the District Court did not therefore extend to this category of Reservist. 323 F. Supp., at 838 n. 3.

in violation of the Incompatibility Clause. They commenced a class action in the District Court against petitioners, the Secretary of Defense and the three Service Secretaries, seeking (1) an order in the nature of mandamus directed to petitioners requiring them to strike from the rolls of the Reserves all Members of Congress presently thereon, to discharge any member of the Reserves who subsequently became a Member of Congress, and to seek to reclaim from Members and former Members of Congress any Reserve pay said Members received while serving as Members of Congress, (2) a permanent injunction preventing petitioners from placing on the rolls of the Reserves any Member of Congress while serving in Congress, and (3) a declaration that membership in the Reserves is an office under the United States prohibited to Members of Congress by Art. I, § 6, cl. 2, and incompatible with membership in the Congress.

Respondents sought the above relief on behalf of four classes of persons. The Committee and the individual respondents sought to represent the interests of (1) all persons opposed to United States military involvement in Vietnam and purporting to use lawful means, including communication with and persuasion of Members of Congress, to end that involvement. The individual respondents alone sought to represent the interests of (2) all officers and enlisted members of the Reserves who were not Members of Congress, (3) all taxpayers of the United States, and (4) all citizens of the United States. The interests of these four classes were alleged to be adversely affected by the Reserve membership of Members of Congress in various ways.

As relevant here, citizens and taxpayers were alleged in respondents' complaint to have suffered injury because Members of Congress holding a Reserve position in the Executive Branch were said to be subject to the possibility

of undue influence by the Executive Branch,[3] in violation of the concept of the independence of Congress implicit in Art. I of the Constitution. Reserve membership was also said to place upon Members of Congress possible inconsistent obligations which might cause them to violate their duty faithfully to perform as Reservists or as Members of Congress. Reserve membership by Members of Congress thus, according to respondents' complaint,

> "deprives or may deprive the individual named plaintiffs and all other citizens and taxpayers of the United States of the faithful discharge by members of Congress who are members of the Reserves of their duties as members of Congress, to which all citizens and taxpayers are entitled." Petn. app., at 46.

Petitioners filed a motion to dismiss Respondents' complaint on the ground that respondents lacked standing to bring the action, and because the complaint failed to state a cause of action upon which relief could be granted. The latter ground was based upon the contention that the Incompatibility Clause sets forth a qualification for Membership in the Congress, U. S. Const., Art. I, § 5, cl. 1, not a qualification for a position in the Executive Branch. The power to judge that qualification was asserted to rest exclusively with Congress, not the courts, under *Powell* v. *McCormack*, 395 U. S. 486, 550 (1969).

The District Court concluded that it first had to de-

---

[3] Respondents appear to have had reference in part to pressure that conceivably could be applied to Reservist Members of Congress through such offices as the President's power to call Reservists to active duty without their consent, 10 U. S. C. §§ 672–75, or his power to discharge commissioned Reservists, who serve only at his pleasure. 10 U. S. C. § 593.

termine whether respondents had standing to bring the action and, without citation to authority, stated:

> "In recent years the Supreme Court has greatly expanded the concept of standing and in this Circuit the concept has now been almost completely abandoned." 323 F. Supp., at 839.

The court then held that of the four classes respondents sought to represent, "[o]nly their status as citizens" gave them standing to sue in this case. *Id.*, at 840. The District Court denied standing to respondents as Reservists, as opponents of our Vietnam involvement, and as taxpayers. The court acknowledged that there were very few instances in which the assertion of "merely the undifferentiated interest of citizens," *id.*, would be sufficient, but was persuaded to find that interest sufficient here by several considerations it found present in the nature of the dispute before it and by the asserted abandonment of standing limitations by the Court of Appeals, whose decisions were binding on the District Court.

In response to petitioners' contention that the Incompatibility Clause sets forth a qualification only for Membership in the Congress, which Congress alone might judge, the District Court characterized the issue as whether respondents presented a nonjusticiable "political question" resolution of which by the text of the Constitution was committed to the Congress under *Baker* v. *Carr*, 369 U. S. 186, 217 (1962). The court held that the failure of the Executive Branch to remove Reservist Members of Congress from their Reserve positions was justiciable.

Having resolved the issues of standing and political question in favor of respondents, the District Court held on the merits that a commission in the Reserves is an "office under the United States" within the meaning of

the Incompatibility Clause. On the basis of the foregoing, the court in its final order granted partial summary judgment for respondents by declaring that the Incompatibility Clause renders a Member of Congress ineligible, during his continuance in office, from holding a Reserve "commission"; the court denied such parts of respondents' motion for summary judgment which sought a permanent injunction and relief in the nature of mandamus.[4] 323 F. Supp., at 843.

The Court of Appeals affirmed the judgment of the District Court in an unpublished opinion "on the basis of the memorandum opinion of the District Court." The Court of Appeals added that it was "also of the view that [respondents] have the requisite standing and that their claim is judicially enforceable under the rationale of" *Flast* v. *Cohen*, *supra*, and *Baker* v. *Carr*, *supra*. Petitioners present three questions for review: (1) whether respondents have standing, "either as citizens or as federal taxpayers," to bring this claim, (2) whether respondents' claim presents a "political question" not subject to judicial review, and (3) whether "membership" in the Reserves constitutes an "office under the United States" within the meaning of the Incompatibility Clause. Petn., at 2.

II

A

In *Flast* v. *Cohen*, 392 U. S. 83, 95 (1968), the Court noted that the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts

---

[4] Respondents did not, in the Court of Appeals, or by cross-petition here challenge the District Court's denial of injunctive and mandamus relief. In light of the ground for our disposition of the case, we need not and do not address ourselves to the validity or scope of the District Court's ruling on the merits of respondents' claim, or the relief it granted.

by the "case or controversy" requirement of Art. III, embodies both the standing and political question doctrines upon which petitioners in part rely. Each of these doctrines poses a distinct and separate limitation, *Powell* v. *McCormack*, *supra*, 395 U. S., at 512; *Baker* v. *Carr*, *supra*, 369 U. S., at 198, so that either the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party. The more sensitive and complex task of determining whether a particular issue presents a political question causes courts, as did the District Court here, to turn initially, although not invariably,[8] to the question of standing to sue. In light of the District Court action we turn to petitioners' contention that respondents lacked standing to bring the suit. Our conclusion that the District Court erred in holding that respondents had standing to sue as United States citizens, but was correct in denying respondents' standing as taxpayers, eliminates the need to consider the other questions presented by petitioners.

The District Court considered standing as to each of the four capacities in which respondents brought suit; it rejected standing as to three of the four, holding that

---

[8] The lack of a fixed rule as to the proper sequence of judicial analysis of contentions involving more than one facet of the concept of justiciability was recently exhibited by the Court of Appeals for the Second Circuit, which bypassed a determination on standing to rule that a claim was not justiciable because it presented a political question:

"The standing of a party need not come into question if a court determines that for other reasons the issue raised before the bench is non-justiciable."

That court thus held in effect that if no justiciable question is presented no one has standing. *DaCosta* v. *Laird*, 471 F. 2d 1146, 1152 (1973). See also *Sierra Club* v. *Morton*, 405 U. S. 727, 731 (1972); *Flast* v. *Cohen*, *supra*, 392 U. S., at 100.

respondents could sue only as citizens. The Court of Appeals' judgment of affirmance, based solely upon the opinion of the District Court, did not alter the District Court's ruling on standing. The standing question presented in the petition for certiorari is addressed to the District Court's holding on citizen standing and seeks to add the question whether respondents also had standing as taxpayers.[6] Respondents do not contend that the District Court erred in denying standing to them in the other two capacities in which they sought to proceed, *i. e.*, as opponents of American military involvement in Vietnam, and as Reservists. We therefore proceed to consideration of respondents' standing only as citizens and taxpayers.

B

Citizen Standing

To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interest and suffer the same injury shared by all members of the class he represents. *Indiana Employment Division* v. *Burney*, 409 U. S. 540 (1973); *Bailey* v. *Patterson*, 369 U. S. 31 (1962). In granting respondents standing to sue as representatives of the class of all United States citizens, the District Court therefore necessarily—and correctly—characterized respondents' interest as "undifferentiated" from that of all other citizens.

The only interest all citizens share in the claim advanced by respondents is one which presents injury in

[6] The Court of Appeals did no more than affirm the judgment of the District Court, including the latter's denial of respondents' standing as taxpayers. Petitioners may, however, have sought to raise the issue of taxpayer standing in this Court because of the ambiguous reference in the Court of Appeals' judgment of affirmance to *Flast* v. *Cohen*, *supra*, a taxpayer-standing case.

the abstract. Respondents seek to have the Judicial Branch compel the Executive Branch to act in conformity with the Incompatibility Clause, an interest shared by all citizens. The very language of respondents' complaint, *supra*, p. 4, reveals that it is nothing more than a matter of speculation whether the claimed nonobservance of that Clause deprives citizens of the faithful discharge of the legislative duties of Reservist Members of Congress. And that claimed nonobservance, standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance, and that is an abstract injury.[7] The Court has previously declined to treat "generalized grievances" about the conduct of Government as a basis for taxpayer standing. *Flast* v. *Cohen*, *supra*, 392 U. S., at 106. We consider now whether a citizen has standing to sue under such a generalized complaint.

Our analysis begins with *Baker* v. *Carr*, *supra*, where the Court stated that the gist of the inquiry must be whether the complaining party has

> "alleged such a personal stake in the outcome of the controversy as to insure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Id.*, 369 U. S., at 204.

Although dealing with a case of claimed taxpayer standing, *Flast* v. *Cohen*, *supra*, gave further meaning to the need for a "personal stake" in noting that it was meant

---

[7] The generalized nature of respondents' claim is revealed by the scope of relief sought, *i. e.*, removal of all Reservist Members of Congress from Reserve status rather than the removal of only those Reservist Members who manifested by their actions that they were influenced by their Reserve status to act adversely to respondents' interest.

to assure that the complainant seeking to adjudicate his claim was the "proper party" to present the claim "in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.*, 392 U. S., at 100–101. In the circumstances of *Flast*, the Court held that the taxpayer-complainant before it had established a relationship between his status as a taxpayer and his claim under the taxing and spending clause sufficient to give assurance

> "that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *Id.*, 392 U. S., at 106.

While *Flast* noted that the "case or controversy" limitation on the federal judicial power found in Art. III is a "blend of constitutional requirements and policy considerations," 392 U. S., at 97, the Court, subsequently, in the context of judicial review of regulatory agency action held that whatever else the "case or controversy" requirement embodied, its essence is a requirement of "injury in fact." *Association of Data Processing Service Organizations* v. *Camp*, *supra*, 397 U. S., at 152. Although we there noted that the categories of judicially cognizable injury were being broadened, *id.*, 397 U. S., at 154, we have more recently stressed that the broadening of *categories* "is a different matter from abandoning the requirement that the party seeking review must have suffered an injury." *Sierra Club* v. *Morton*, *supra*, n. 9, 405 U. S., at 738. And, in defining the nature of that injury, we have only recently stated flatly: "Abstract injury is not enough." *O'Shea* v. *Littleton*, — U. S. — (1974).

Ex parte Levitt, 302 U. S. 633 (1937), was the only

other occasion in which the Court faced a question under Art. I, § 6, cl. 2, although that challenge was made under the Ineligibility Clause, not the Incompatibility Clause involved here. There a petition was filed in this Court seeking an order to show cause why one of the Justices should not be disqualified to serve as an Associate Justice. The petition asserted that the appointment and confirmation of the Justice in August 1937 was unlawful because the Act of March 1, 1937, permitting Justices to retire at full salary after a period of specified service, thereby increased the emoluments of the office and that the statute was enacted while the challenged Justice was a Senator. The appointment of the Justice by the President and his confirmation by the Senate were thus said to violate the Ineligibility Clause which provides:

> "No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States . . . the emoluments whereof shall have been increased during such time. . . ."

The Court held:

> "The motion papers disclose no interest upon the part of the petitioner other than that of a citizen and a member of the bar of this Court. That is insufficient. It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely the general interest common to all members of the public." *Id.*, at 634.[8]

[8] The Court cited a number of cases in support of its holding, nearly all of which contained language similar to that quoted

The Court has today recognized the continued vitality of *Levitt*,[9] *United States* v. *Richardson*, No. 72–885, slip op., at 10–13; see also *Laird* v. *Tatum*, 408 U. S. 1, 13 (1972). We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party have suffered a particular injury caused by the action challenged as unlawful. This personal stake is what the Court has consistently held enables a complainant authoritatively to present to a

---

in text. See *Massachusetts (Frothingham)* v. *Mellon*, 262 U. S. 447, 488 (1923) (insufficient for a party to show "merely that he suffers in some indefinite way in common with people generally."); *Fairchild* v. *Hughes*, 258 U. S. 126, 129–130 (1922) ("Plaintiff has only the right, possessed by every citizen, to require that the government be administered according to law and that public moneys not be wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit"); *Tyler* v. *Judges*, 179 U. S. 405, 406 (1900) ("even in a proceeding which he prosecutes for the benefit of the public . . . [the plaintiff] must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens"). See also *Giles* v. *Harris*, 189 U. S. 475, 486 (1903) ("The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the United States Constitution and asks us to declare it void. But, of course, he could not maintain a bill for a mere declaration in the air." (Holmes, J.). Cf. *Newman* v. *Frizzell*, 238 U. S. 537, 550 (1915).

[9] The Court has also recently cited with approval two of the principal cases relied upon in *Levitt*. *Massachusetts (Frothingham)* v. *Mellon*, *supra*, n. 8, was used for support in *O'Shea* v. *Littleton*, *supra*, — U. S., at —, as was *Fairchild* v. *Hughes*, *supra*, n. 8, used in *Baker* v. *Carr*, *supra*, 369 U. S., at 208.

court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance. Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it to develop its rules of law.[10] Only concrete injury presents the factual context within which a court, aided by parties who argue within the context, is capable of making decisions.

Moreover, when a court is asked to undertake constitutional adjudication, the most important and delicate of its responsibilities, the requirement of concrete injury further serves the function of insuring that such adjudication does not take place unnecessarily. This principle is particularly applicable here, where respondents seek an interpretation of a constitutional provision which has never before been construed by the federal courts. First, concrete injury removes from the realm of speculation whether there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party.

> "The desire to obtain [sweeping relief] cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that his individual need requires the remedy for which he asks." *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 164 (1914).

Second, the discrete factual context within which the concrete injury occurred or is threatened insures the fram-

[10] This is in sharp contrast to the political processes in which the Congress can initiate inquiry and action, define issues and objectives and exercise virtually unlimited power by way of hearings and reports, thus making a record for plenary consideration and solutions. The legislative function is inherently general rather than particular and is not intended to be responsive to adversaries asserting specific claims or interests peculiar to themselves.

ing of relief no more broad than required by the precise facts to which the court's ruling would be applied. This is especially important when the relief sought produces a confrontation with one of the coordinate branches of the government; here the relief sought would, in practical effect, bring about conflict with both coordinate branches.

To permit a complainant who has no concrete injury to require a court to rule on important constitutional issues in the abstract would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing "government by injunction."

> "The powers of the federal judiciary will be adequate for the great burdens placed upon them only if they are employed prudently, with recognition of the strengths as well as hazards that go with our kind of representative government." *Flast* v. *Cohen*, *supra*, 392 U. S., at 131 (Harlan, J., dissenting).[11]

Our conclusion that there is no citizen standing here, apart from being in accord with all other federal courts of appeals that have considered the question, until the Court of Appeals' holding now under review,[12] is also

---

[11] We have expressed apprehension about claims of standing based on "mere 'interest in a problem.'" See, *e. g.*, *Sierra Club*, *supra*, 405 U. S., at 739. Earlier cases of the Court evidenced comparable concerns. See, *e. g.*, *Newman* v. *Frizzell*, *supra*, n. 8, 238 U. S., at 552.

[12] *Lamm* v. *Volpe*, 449 F. 2d 1202, 1204 (CA10 1971); *Pietsch* v. *President of United States*, 434 F. 2d 861, 863 (CA2 1970) (Clark, Assoc. Justice); *Troutman* v. *Shriver*, 417 F. 2d 171, 174 (CA5 1969) (citing Levitt, *supra*); *Velvel* v. *Nixon*, 415 F. 2d 236, 239 (CA10 1969); *Pauling* v. *McElroy*, — U. S. App. D. C. —, 278 F. 2d 252, 254 (1960); cf. *Sharrow* v. *Brown*, 447 F. 2d 94, 97 (CA2 1971). And aside from the decision under review, the only other

consistent with the recent holdings of this Court. It is one thing for a court to hear an individual's complaint that certain specific government action will cause that person private competitive injury, *Data Processing*, *supra*, or a complaint that individual enjoyment of certain natural resources has been impaired by such action, *United States* v. *Students Challenging Regulating Agency Procedures* (*SCRAP*), 412 U. S. 669, 687 (1973), but it is another matter to allow a citizen to call on the courts to resolve abstract questions.[13] The former provides the setting for a focused consideration of a concrete injury. In the latter, although allegations assert an arguable conflict with some limitation of the Constitution, it can be only a matter of speculation whether the claimed violation has caused concrete injury to the particular complainant.

Finally, the several considerations advanced by the District Court in support of respondents' standing as citizens do not militate against our conclusion that it was error to grant standing to respondents as citizens. First, the District Court acknowledged that any injury resulting from the Reservist status of Members of Congress was hypothetical, but stressed that the Incompatibility

---

opinion that appears to have ruled otherwise is *Atlee* v. *Laird*, 339 F. Supp. 1347 (ED Pa.), (1972), which relied upon the decision of the District Court here. *Id.*, at 1357 n. 8.

[13] The Court of Appeals reliance on *Baker* v. *Carr*, *supra*, is inapposite. *SCRAP* pointed out that a personal stake in a fraction of a vote in *Baker* v. *Carr* was sufficient to support standing. 412 U. S. 689 n. 14. The injury asserted in *Baker* was thus a concrete injury to fundamental voting rights, as distinguished from the abstract injury in nonobservance of the Constitution asserted by respondents as citizens.

In *Baker* v. *Carr*, the Court cited with approval the early case of *Liverpool Steamship Co.* v. *Comm'rs of Emigration*, 113 U. S. 33 (1885), where it was held that a federal court can adjudge rights only "in actual controversies." *Id.*, at 39.

Clause was designed to prohibit such potential for injury.[14] 323 F. Supp., at 840. This rationale fails, however, to compensate for the respondents' failure to present a claim under that Clause which alleges concrete injury. The claims of respondents here, like the claim under the Ineligibility Clause in *Levitt, supra*, would require courts to deal with a difficult and sensitive issue of constitutional adjudication on the complaint of one who does not allege "a personal stake in the outcome of the controversy." *Baker* v. *Carr, supra*, 369 U. S., at 204. To support standing there must be concrete injury in a form which assures "the necessary specificity" called for by *Flast, supra*, and "that concrete adverseness . . . upon which the court so largely depends for the illumination of difficult constitutional questions." *Baker* v. *Carr, supra*, at 204. Standing was thus found by premature evaluation of the merits of respondents complaint.[15]

---

[14] The District Court made analogy to conflict-of-interest statutes which, it said, are directed at avoiding circumstances of potential, not actual, impropriety. We have no doubt that if the Congress enacted a statute creating such a legal right, the requisite injury for standing would be found in an invasion of that right. *O'Shea* v. *Littleton, supra*, 42 U. S. L. W., at 4141 n. 2; *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 616 n. 4 (1973); *Association of Data Processing Service Organization* v. *Camp, supra*, 397 U. S., at 154. But to satisfy the Art. III prerequisite the complaining party would still be required to allege a specific invasion of that right suffered by him. Standing could not—as it is not here—be found in a citizen who alleged no more than the right of all other citizens to have government conducted without what he perceived, without himself having suffered concrete harm, to be proscribed conflicts of interest.

[15] Looking "to the substantive issues" which *Flast* stated to be both "appropriate and necessary" in relation to taxpayer standing was for the express purpose of determining "whether there is a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." This step is not appropriate on a claim of citizen standing since the *Flast* nexus test is not applicable where

The District Court next acknowledged this Court's long-standing reluctance to entertain "generalized grievances about the conduct of Goverment," *Flast* v. *Cohen*, *supra*, 392 U. S., at 106, but distinguished respondents' complaint from such grievances by characterizing the Incompatibility Clause as "precise and self-operative." 323 F. Supp., at 840. Even accepting that characterization of the Clause it is not an adequate substitute for the judicially cognizable injury not present here. Moreover that characterization rested, as did the preceding characterization, on an interpretation of the Clause by way of the Court's preliminary appraisal of the merits of respondents' claim before standing was found. In any event, the Ineligibility Clause involved in *Levitt*, *supra*, is no less specific or less "precise and self-operative" than the Incompatibility Clause.

The District Court further relied on the fact that the adverse parties sharply conflicted in their interests and views and were supported by able briefs and arguments. 323 F. Supp., at 840. We have no doubt about the sincerity of respondents' stated objectives and the depth of their commitment to them. But the essence of standing

> "is not a question of motivation but of possession of the requisite . . . interest that is, or is threatened to be, injured by the unconstitutional conduct." *Doremus* v. *Board of Education*, *supra*, 342 U. S., at 435.

This same theme as to the inadequacy of motivation to support standing is suggested in the Court's opinion in *Sierra Club*, *supra*:

> "But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how quali-

---

the taxing and spending power is not challenged. Hence there was no occasion for the District Court or the Court of Appeals to reach or evaluate what it saw as the merits of respondents' complaint.

fied the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA." 405 U. S., at 739.

Respondents' motivation has indeed brought them sharply into conflict with petitioners, but as the Court has noted, motivation is not a substitute for the actual injury needed by the courts and adversaries to focus litigation efforts and judicial decision-making. Moreover, the evaluation of the quality of the presentation on the merits was a retrospective judgment that could have properly been arrived at only after standing had been found so as to permit the court to consider the merits. A logical corollary to this approach would be the manifestly untenable view that the inadequacy of the presentation on the merits would be an appropriate basis for denying standing.

Furthermore, to have reached the conclusion that respondents' interests as citizens were meant to be protected by the Incompatibility Clause because the primary purpose of the Clause was to insure independence of each of the branches of the Federal Government, similarly involved an appraisal of the merits before the issue of standing was resolved. All citizens, of course, share equally an interest in the independence of each branch of government. In some fashion, every provision of the Constitution was meant to serve the interests of all. Such a generalized interest, however, is too abstract to constitute a "case or controversy" appropriate for judicial resolution.[16] The proposition that all constitutional pro-

[16] Satisfaction of the *Data Processing* "zone of interest" requirement seemingly relied upon to find citizen standing does not support such standing for two reasons: first, that case involved judicial review under the Administrative Procedure Act of regulatory agency action alleged to have caused private competitive injury; second,

visions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.

Closely linked to the idea that generalized citizen interest is a sufficient basis for standing was the District Court's observation that it was not irrelevant that if respondents could not obtain judicial review of petitioners' action, "then as a practical matter no one can." Our system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing. See *United States* v. *Richardson*, No. 72–885, decided today, slip op., at 14–15.

C

Taxpayer Standing

Consideration of whether respondents have standing to sue as taxpayers raises a different question from whether they may sue as citizens. *Flast* v. *Cohen*, *supra*, established that status as a taxpayer can, under certain limited circumstances, supply the personal stake essential to standing. There, the Court held that, in order to ensure the necessary personal stake, there must be "a logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated," 392 U. S., at 102. In *Flast*, the Court determined that the taxpayer demonstrated such a "logical nexus" because, (1) he challenged the exercise of "Congressional power under the taxing and spending clause of Art. I, § 8 . . ." and (2) "the challenged enactment exceed[ed] specific constitutional limitations imposed upon the exercise of the Congres-

---

Data Processing required a showing of injury in fact, in addition to the "zone of interest" requirement. Until a judicially cognizable injury is shown no other inquiry is relevant to consideration of citizen standing.

sional taxing and spending power" under Art. I, § 8. *Id.*, at 102–103.

Here, the District Court, applying the *Flast* holding, denied respondents' standing as taxpayers for failure to satisfy the nexus test. We agree with that conclusion since respondents did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve status.[17]

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

---

[17] As noted earlier, *supra*, p. 3, respondents requested the District Court to compel petitioners to seek to reclaim Reserve pay received by Reservist Members of Congress. Such relief would follow from the invalidity of Executive action in paying persons who could not lawfully have been Reservists, not from the invalidity of the statutes authorizing pay to those who lawfully were Reservists.

SUPREME COURT OF THE UNITED STATES

No. 72–1188

James R. Schlesinger, Secretary of Defense, et al., Petitioners, *v.* Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1974]

MR. JUSTICE STEWART, concurring.

I agree with the Court that the respondents lack standing to sue either as citizens or taxpayers in this case. Here, unlike *United States* v. *Richardson, post,* at —, the respondents do not allege that the petitioners have refused to perform an affirmative duty imposed upon them by the Constitution. Nor can there be taxpayer standing under *Flast* v. *Cohen,* 392 U. S. 83, since there is simply no challenge to an exercise of the taxing and spending power.

The Court's judgment in this case is wholly consistent with *United States* v. *SCRAP,* 412 U. S. 669. Standing is not today found wanting because an injury has been suffered by many, but rather because *none* of the respondents has alleged the sort of direct, palpable injury required for standing under Art. III. Like the plaintiff in *Frothingham* v. *Mellon,* 262 U. S. 447, the respondents seek only to air what we described in *Flast* as "generalized grievances about the conduct of government." 392 U. S., at 106. Our prior cases make clear that such abstract allegations cannot suffice to confer Art. III standing, and I therefore join the opinion and judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 72–1188

James R. Schlesinger, Secretary of Defense, et al., Petitioners, v. Reservists Committee to Stop the War et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1974]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL joins, dissenting.

The requirement of "standing" to sue is a judicially created instrument serving several ends: (1) It protects the status quo by reducing the challenges that may be made to it and to its institutions. It greatly restricts the classes of persons who may challenge administrative action. Its application in this case serves to make the bureaucracy of the Pentagon more and more immune from the protests of citizens. (2) It sometimes is used to bar from the courts questions which by the Constitution are left to the other two coordinate branches to resolve, *viz.* the so-called political question. (3) It is at times a way of ridding court dockets whether of abstract questions or questions involving no concrete controversial issue.

Our leading case is *Frothingham* v. *Mellon*, 262 U. S. 447, decided in 1923, where a taxpayer challenged the constitutionality of an Act of Congress that gave grants to States which agreed to a plan to reduce maternal and infant mortality. The Court said:

> "The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is

> essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained. It is of much significance that no precedent sustaining the right to maintain suits like this has been called to our attention, although, since the formation of the government, as an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect." *Id.*, at 487–488.

That ruling had in it an admixture of the "political question" because, said the Court, the only occasion when the federal court may act is when a federal law results in "some direct injury suffered or threatened, presenting a justiciable issue." *Id.*, at 488. When that element is lacking, judicial intrusion would trespass on powers granted another department of Government. "To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department—an authority which plainly we do not possess." *Id.*, at 488–489.

In 1968—45 years after *Frothingham*—that case was revisited in *Flast* v. *Cohen*, 392 U. S. 83, where federal taxpayers sued to enjoin the expenditure of federal funds under an Act of Congress granting financial aid to religious schools. The Court held that those taxpayers

did have "standing" to sue for two reasons. *First*, because they challenged the exercise of congressional power under the taxing and spending clause of Art. I, § 8 of the Constitution, not the incidental expenditure of tax funds in the administration of an essentially regulatory statute. *Second*, because the challenged enactment exceeded the limitations imposed upon the exercise of the congressional taxing and spending power. See *id.*, at 102–104. Therefore, the Court concluded the taxpayer had "the requisite personal stake", *id.*, at 101, in the litigation to have "standing" to sue and the Court went on to hold that the Establishment Clause of the First Amendment "operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Article I, § 8." *Id.*, at 104.

The present case implicates two provisions of the Constitution. Article I, § 8 provides "The Congress shall have Power To lay and correct Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." Article I, § 6, cl. 2 of the Constitution says "no Person holding any Office [1] under the United States, shall be a Member of either House during his Continuance in Office."

The present suit is not one to oust Members from Congress. Rather it is brought against the Secretary of Defense challenging his keeping in the Armed Services of the United States Members of Congress who hold commissions as reservists.

Various Acts of Congress make various appropriations for the services of reservists. See, *e. g.*, Pub. L. 92–145,

[1] I agree with the conclusion of the House Judiciary Committee, H. R. Rep. No. 885, 64th Cong., 1st Sess. (1916), that a commission in the National Guard is an "office" in the constitutional sense. A commission in the reserves is not distinguishable. See *United States* v. *Hartwell*, 6 Wall. 385.

92d Cong., 1st Sess., 85 Stat. 414; Pub. L. 92–545, 92d Cong., 2d Sess., 86 Stat. 1154.

Art. I, § 6, cl. 2 is often referred to as the Incompatibility Clause. At the 1783 convention it was proposed that Members of Congress be allowed to serve in the Executive Branch,[2] others were opposed; Mason apparently represented the majority view when he insisted that "ineligibility will keep out corruption, by excluding office-hunters."[3] Art. I, § 6, cl. 2, like the Establishment Clause of the First Amendment, "was designed as a specific bulwark against such potential abuses . . . and . . . operates as a specific constitutional limitation upon" such expenditures. *Flast* v. *Cohen*, *supra*, at 104.

As stated by Hamilton in The Federalist No. 76, the Incompatibility Clause had a specific purpose: to avoid "the danger of executive influence upon the legislative body." P. 476 (H. Lodge ed. 1888).

While respondents have standing as taxpayers, their citizenship also gives them standing to challenge the appropriation acts financing activities of the reservists.

We tend to overlook the basic political and legal reality that the people, not the bureaucracy, are the sovereign. Our Federal Government was created for the security and happiness of the people. Executives, lawmakers, and members of the Judiciary are inferior in the sense that they are in office only to carry out and execute the constitutional regime.

The Preamble of the Constitution states that "We the People" ordained and established the Constitution.

The Declaration of Independence stated that to insure "certain unalienable Rights," "Governments are instituted among Men, deriving their just powers from the consent of the governed" and "That whenever any Form

---

[2] See 2. Farand, The Records of the Federal Convention of 1787 (1911) 283–290.

[3] *Id.*, at 491.

of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it."

The present case does not involve a restructuring of society—a procedure left to legislative action in part but mostly to constitutional conventions. All the present citizens seek is to have the Constitution enforced as it is written. It is not a suit to unseat Members of Congress. Any decree that issued would run to the Secretary of Defense to take the challenged reservists off his list.

The interest of citizens is obvious. The complaint alleges injuries to the ability of the average citizen to make his political advocacy effective whenever it touches on the vast interests of the Pentagon. It is said that all who oppose the expansion of military influence in our national affairs find they are met with a powerful lobby—the Reserve Officers Association—which has strong congressional allies.

Whether that is true or not we do not know. So far as the Incompatibility Clause of the Constitution is concerned that contention is immaterial. It is as immaterial to the function of Art. I, § 6, cl. 2 of the Constitution as would be a suggestion that the establishment of a religion under the First Amendment is benign in a given case. What the Framers did in each case was to set up constitutional fences barring certain affiliations, certain kinds of appropriations. Their judgment was that the potential for evil was so great that no appropriations of that character should be made.

The interest of citizens in guarantees written in the Constitution seems obvious. Who other than citizens have a better right to have the Incompatibility Clause enforced? It is their interests that the Incompatibility Clause was designed to protect. The Executive branch under our regime is not a fiefdom or principality competing with the Legislative as another center of power. They operate within a constitutional framework, and it is that

constitutional framework that these citizens want to keep intact. That is, in my view, their rightful concern. We have insisted that more than generalized grievances of a citizen be shown, that he must have a "personal stake in the outcome," *Baker* v. *Carr*, 369 U. S. 186, 204. But that "personal stake" need not be a monetary one. In *Baker* v. *Carr* it was the right to vote, an important badge of citizenship. The "personal stake" in the present case is keeping the Incompatibility Clause an operative force in government by freeing the entanglement of the federal bureaucracy with the Legislative Branch.

Ex parte Lévitt, 302 U. S. 633, is not opposed. Lévitt moved in this Court to have it declare the appointment of Mr. Justice Black unconstitutional. He alleged that Mr. Justice Black, as Senator, had voted to increase the "emoluments" of the office of Associate Justice and was therefore barred from taking office by reason of Art. I, § 6, cl. 2 of the Constitution. The Court denied the motion to file an original action stating:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public." *Id.*, at 634.

The only "emolument" of office which Mr. Justice Black as Senator had voted to increase was the retirement compensation of federal judges as spelled out in the Act of March 1, 1937. 50 Stat. 24, c. 21. That emolument might never accrue to an appointee for he would first have to serve a designated number of years. It turned out that even though Justice Black served over 34 years

he never received any benefits under the Retirement Act. Hence the Court showed wisdom in deciding that Lévitt showed no "direct injury." His claim of constitutional violation was remote, speculative, and contingent. The present suit has no such deficiency. It asserts a present, ongoing conflict between the Pentagon's policies and the Incompatibility Clause of the Constitution.

The interest of the citizen in this constitutional question is, of course, common to all citizens. But as we said in *United States* v. *SCRAP*, 412 U. S. 669, 687–688, "standing is not to be denied simply because many people suffer the same injury .... To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."

I would affirm the judgment below.

SUPREME COURT OF THE UNITED STATES

Nos. 72-1188 AND 72-885

James R. Schlesinger, Secretary of Defense, et al., Petitioners,
72-1188 *v.*
Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

United States et al., Petitioners,
72-885 *v.*
William B. Richardson.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June 25, 1974]

MR. JUSTICE BRENNAN, dissenting.

The "standing" of a plaintiff to be heard on a claim of invasion of his alleged legally protected right is established, in my view, by his good faith allegation that "the challenged action has caused him injury in fact." *Barlow* v. *Collins*, 397 U. S. 159, 167-168 (1970) (concurring opinion). The Court's further inquiry, in each of these cases, into the connection between "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question," and the "interest sought to be protected by the complainant," is relevant, not to standing" but, if at all, only to such limitations on exercise of the judicial function as justiciability, see, *e. g.*, *Baker* v. *Carr*, 369 U. S. 186 (1962), or reviewability, see, *e. g.*, *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967).

Richardson plainly alleged injury in fact. My Brother STEWART demonstrates this in his analysis of Richardson's claimed right to have the budget of the Central Intelligence Agency published. The claim was not merely that failure to publish was a violation of the Constitution. The claim went further and alleged that this violation deprived Richardson, as an individual, and not as an inseparable part of the citizenry, of a right given him by Art. I, § 9, cl. 7. Moreover, his complaint, properly construed, alleged that the violations caused him injury not only in respect of his right as a citizen to know how Congress was spending the public fisc, but also in respect of his right as a voter to receive information to aid his decision how and for whom to vote. These claims may ultimately fail on the merits, but Richardson has "standing" to assert them.

Similarly, I would hold that respondent Reservists Committee and its members have demonstrated sufficient "injury in fact" to maintain their suit. Their allegation that they are injured as taxpayers, while at first glance seeming extraordinarily difficult to prove, is neither impossible nor, on the basis of this record, made in bad faith. If the Secretary of Defense takes a contrary position with regard to either of these requirements, it is open to him to move for summary judgment and compel respondents to establish their position. See *Barlow*, *supra*, at 175. More stringent requirements, such as the Court's demand that these respondents satisfy *Flast's* "nexus" requirement, are not appropriate issues for resolution under the rubric of "standing." Since I would find the injury-in-fact requirement met by respondents' taxpayer allegation, I have no occasion to reach the question whether respondent Reservists Committee and its members' allegations of injury to their interests as citi-

zens would be sufficient to confer standing under the circumstances of this case.

Unlike my Brother STEWART, who distinguishes these two cases, I would find that *Flast* v. *Cohen*, 392 U. S. 83 (1968), supports the conclusion that these allegations of injury in fact are sufficient to give respondents in both cases "standing." Speaking generally of standing, we there said:

> "The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated. The 'gist of the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). In other words, when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id.*, at 99–100.

The two-pronged test fashioned by *Flast* was not a qualification upon these general principles but was fashioned solely as a determinant of standing of plaintiffs alleging only injury as taxpayers who challenge alleged violations of the Establishment and Free Exercise Clauses of the First Amendment. See *Barlow* v. *Collins*, *supra*, at 170–172. The extension of that test to the very different challenges here only produces the confusion evidenced by the differing views of the *Flast* test expressed in the several opinions filed today in these cases. Outside its proper sphere, as my Brother POWELL soundly

observes, that test is not "a reliable indicator of when a federal taxpayer has standing." *Ante*, at p. ——. We avoid that confusion if, as I said in *Barlow*, *supra*, at 176, we recognize that

> ". . . alleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what it at issue in a given case, and thus to risk uninformed, poorly reasoned decisions that may result in injustice. . . .
>
> "The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing."

SUPREME COURT OF THE UNITED STATES

No. 72-1188

James R. Schlesinger, Secretary of Defense, et al., Petitioners, v. Reservists Committee to Stop the War et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[June 25, 1974]

MR. JUSTICE MARSHALL, dissenting.

I agree with my Brother DOUGLAS that respondents have standing as citizens to bring this action. I cannot accept the majority's characterization of respondents' complaint as alleging only "injury in the abstract" and "'generalized grievances' about the conduct of government." *Ante*, at 8–9. According to their complaint, respondents are present and former members of the various armed forces reserves

> "organized for the purpose of opposing the military involvement of the United States in Vietnam and of using all lawful means to end that involvement, including efforts by its members individually to persuade the Congress of the United States and all members of the Congress to take all steps necessary and appropriate to end that involvement."

The specific interest which they thus asserted, and which they alleged had been infringed by violations of the Incompatibility Clause, though doubtless widely shared, is certainly not a "general interest common to all members of the public." *Ex parte Levitt*, 302 U. S. 633, 634 (1937). Not all citizens desired to have the Congress

take all steps necessary to terminate American involvement in Vietnam, and not all citizens who so desired sought to persuade members of Congress to that end.

Respondents nevertheless had a right under the First Amendment to attempt to persuade Congressmen to end the war in Vietnam. And respondents have alleged a right, under the Incompatibility Clause, to have their arguments considered by Congressmen not subject to a conflict of interest by virtue of their positions in the armed forces reserves. Respondents' complaint therefore states, in my view, a claim of direct and concrete injury to a judicially cognizable interest. It is a sad commentary on our priorities that a litigant who contends that a violation of a federal statute has interfered with his aesthetic appreciation of natural resources can have that claim heard by a federal court, see *United States* v. *SCRAP*, 412 U. S. 669, 687 (1973), while one who contends that a violation of a specific provision of the United States Constitution has interfered with the effectiveness of expression protected by the First Amendment is turned away without a hearing on the merits of his claim.

I respectfully dissent.